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No.

# In the Supreme Court of the United States

October Term, 1982

TRIBUNE PUBLISHING COMPANY d/b/a  
COLUMBIA DAILY TRIBUNE, and  
NATE BROWN,  
*Petitioners,*

vs.

SANDRA K. HYDE and CITY OF  
COLUMBIA, MISSOURI,  
*Respondents.*

**PETITION OF TRIBUNE PUBLISHING COMPANY  
d/b/a COLUMBIA DAILY TRIBUNE, AND NATE  
BROWN FOR A WRIT OF CERTIORARI TO THE  
MISSOURI COURT OF APPEALS,  
WESTERN DISTRICT**

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Nate Brown*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment forbids the punishment of a newspaper under a tort theory of negligence for its accurate publication of truthful information which has been provided to it by the government?

2. Assuming, *arguendo*, that the First Amendment permits the punishment of a newspaper for accurately publishing truthful information provided to it by the government, whether simple negligence constitutes a permissible standard of liability?

## LIST OF PARTIES

The parties to this action include Defendants-Petitioners Tribune Publishing Company<sup>1</sup> d/b/a *Columbia Daily Tribune* and Nate Brown, Plaintiff-Respondent Sandra K. Hyde, and Defendant-Respondent City of Columbia, Missouri.

Walter Potter and the Missourian Publishing Association, Inc. d/b/a *Columbia Missourian*, were also named as defendants in respondent Hyde's petition. Because respondent Hyde did not appeal from the trial court's dismissal of her claims against those parties, however, they are no longer involved in this action.

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1. The Tribune Publishing Company is not wholly owned by or affiliated with any other corporation. Sun Communications, Inc., of Fulton, Missouri, is a wholly-owned subsidiary of the Tribune Publishing Co.

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WESTERN DISTRICT**

Petitioners, the Tribune Publishing Company, d/b/a *Columbia Daily Tribune*, and Nate Brown respectfully pray this Honorable Court that a writ of certiorari be issued to review the decision of the Missouri Court of Appeals, Western District, entered in this case on June 15, 1982, and the Order of the Supreme Court of Missouri denying transfer entered September 13, 1982.

### **OPINION AND ORDERS BELOW**

The order of the Circuit Court of Boone County, Missouri, Case No. CV180-1601CC, entered December 24, 1980, is not reported but is reproduced herein at Appendix A. The opinion of the Missouri Court of Appeals, Western District, Case No. WD 32,406, entered June 15, 1982, is reported at 637 S.W.2d 251 and is reproduced herein at Appendix B. The Order of the Missouri Court of Appeals, Western District, in Case No. WD 32,406, entered August 3, 1982, overruling a motion for rehearing and denying transfer to the Supreme Court of Missouri is not reported and is reproduced herein at Appendix C. The Order of the Supreme Court of Missouri in Case No. 64306, entered September 13, 1982, denying application for transfer to that court is not reported and is reproduced herein at Appendix D.

### **JURISDICTIONAL STATEMENT**

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) (1980) upon the ground that the judgment and opinion of the Missouri Court of Appeals violates the rights of petitioners under the First and Fourteenth Amendments to the Constitution of the United States.

In reversing the dismissal of respondent Hyde's negligence claims against petitioners and remanding the case for trial, the Missouri Court of Appeals held under the authority of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that petitioners may be found liable for damages under a theory of simple negligence for their truthful and accurate publication of the identity of an assault victim,

information which had been provided petitioners and other members of the press by the local police department. In so holding, the court expressly rejected petitioners' contention that the First and Fourteenth Amendments to the Constitution of the United States prohibit imposition of negligence liability under these circumstances. The court held that the news media have a duty to foresee that an accurate publication of truthful information, which they had lawfully obtained, could be used by a third party to commit an additional crime upon respondent Hyde and that they could be found to be negligent for not suppressing its publication.<sup>2</sup>

Following the court of appeals' denial of their motion for rehearing and/or for transfer to the Missouri Supreme Court, petitioners applied to the Missouri Supreme Court for the transfer of this cause to that court. As one basis for their application for transfer, petitioners contended that the court of appeals had erred in rejecting petitioners' First Amendment challenges to the petition. On September 13, 1982, the Missouri Supreme Court entered an order denying petitioners' application for transfer. That order is reproduced herein at Appendix D. (A-47) Because the Supreme Court of Missouri declined to accept petitioners'

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2. The court stated:

In sum, the petition comes validly within the culminated constitutional balance struck by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)] which allows a private redress against a newspaper for negligent publication of information on a theory of fault free from the proof restraints of *New York Times v. Sullivan*, 376 U.S. 254 (1964)].

\* \* \*

The petition of the victim-plaintiff taken at most favorable intendment states a cause of action in negligence against the news medium defendants free from the proof constraints of *New York Times v. Sullivan* [376 U.S. 254 (1964)] as well as any constraints of common law privilege.

(A-21, 27)

application for transfer, the Missouri Court of Appeals, Western District, is the highest court in which a decision could be had. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976); *Douglas v. California*, 372 U.S. 353, 354 n.1 (1963).

The court of appeals' decision rejecting petitioners' First Amendment claims and reinstating respondent Hyde's petition is sufficiently precise<sup>3</sup> and final to be reviewable by this Court. As in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), reversal of the state court's decision on the First Amendment issues will preclude any further litigation of respondent Hyde's claim against petitioners. Although petitioners might ultimately prevail at trial, this would be a hollow victory, for then the decision of the Missouri Court of Appeals would go unreviewed and remain in effect. This would inevitably chill the exercise of First Amendment rights by "leav[ing] the press . . . operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt . . . ." *Cox Broadcasting Corp.*, 420 U.S. at 486.

Nor would reversal of the court of appeals' decision following a judgment for respondent Hyde fully vindicate the important federal rights here at stake. Here, "[t]he duration of a trial is intolerably long when measured by [the] First Amendment clock. Appeal is therefore a clearly inadequate remedy for [petitioners]. If they were forced to wait for appellate review until a final disposition of their case by the [trial] court, their First Amendment

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3. Cf. *Nat'l Broadcasting Co. v. Niemi*, 434 U.S. 1354, 1355-56 (1978) (opinion of Rehnquist, J., in chambers denying application for stay of judgment of state appellate court in part because of the imprecision of the state court's opinion on the First Amendment issues).

rights to timely expression would be irretrievably lost." *In re Halkin*, 598 F.2d 176, 199 (D.C. Cir. 1979). Due to the inevitable chilling effect upon the exercise of First Amendment rights if the decision of the Missouri Court of Appeals is allowed to stand and respondent Hyde permitted to proceed with her claims against petitioners, a refusal to immediately review the decision would seriously erode federal policy.

For these reasons, the opinion and judgment of the Missouri Court of Appeals rejecting petitioners' contention that respondent Hyde's claims are barred by the First and Fourteenth Amendments to the United States Constitution is a final judgment or decree presently reviewable by this Court pursuant to 28 U.S.C. § 1257(3). *Cox Broadcasting Corp.*, 420 U.S. at 482-487.

### CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which petitioners contend are violated by the judgment and opinion of the Missouri Court of Appeals are the following clauses of the First Amendment to the Constitution of the United States:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

and the following clause of the Fourteenth Amendment to the Constitution of the United States:

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

## STATEMENT OF THE CASE

Shortly after midnight on August 20, 1980, respondent Sandra K. Hyde contacted the municipal police department of the City of Columbia, Missouri, and reported that she had been abducted at gunpoint by an unknown assailant near a local night spot but that shortly thereafter she had managed to escape from the assailant's automobile as it turned a corner.<sup>4</sup> (L.F. 1, 32, 33)<sup>5</sup>

This information was recorded by the Columbia Police Department on a standard "Crime Against Persons" report form. (L.F. 1, 32, 33) On the same day, that report was made available to the public by the City of Columbia Police Department. Specifically, that report was provided by the Columbia Police Department to petitioner Nate Brown, a reporter for petitioner Tribune Publishing Company, publisher of the *Columbia Daily Tribune*, the afternoon newspaper of general circulation in Columbia, Missouri, and to Walter Potter, a reporter for *Missourian Publishing Association, Inc.*, a corporation operated by the University of Missouri School of Journalism which publishes the *Columbia Missourian*, the morning newspaper of general circulation in Columbia, Missouri. (L.F. 1)

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4. The facts set forth in the Statement of the Case are drawn from respondent Hyde's petition (L.F. 1-3) and from interrogatory answers and documents produced during the course of pretrial discovery. (L.F. 17-64) The facts relied upon by the Missouri Court of Appeals in its decision below were taken selectively from these sources. (A-32)

5. Under Missouri appellate procedure, the Record on Appeal is divided into two components: the "legal file", consisting of the pleadings and other written portions of the trial record, and the "transcript", consisting of the portions of the trial proceedings not previously reduced to written form. Mo. R. Civ. P. 81.12. Those components will herein be designated "L.F." and "T.", respectively.

In the afternoon on August 20, 1980, the *Columbia Daily Tribune* published a brief account of the incident which included the identity of respondent Hyde obtained from the police report. (L.F. 1) The *Columbia Missourian* published a similarly short article, also identifying respondent Hyde, in its newspaper the following morning, August 21, 1980. (L.F. 1)

Respondent Hyde commenced this action by filing a petition (L.F. 1-3) in the Circuit Court of Boone County, Missouri, in which she claimed that on several occasions following the publication of these articles, she had been threatened by a person whom respondent identifies as her assailant. Respondent Hyde sought to recover damages from petitioners and the other defendants below, claiming that they were negligent for having released her identity to the public while her assailant was still at large. (L.F. 1-3, A-27)

The Circuit Court of Boone County, Missouri, The Honorable Ellen Roper, Judge, sustained motions to dismiss respondent Hyde's petition for failure to state a claim. (A-1) Respondent Hyde then filed an appeal against petitioners and the City of Columbia, Missouri, to the Missouri Court of Appeals, Western District.<sup>6</sup>

On appeal, the Missouri Court of Appeals first addressed the question whether information contained in the police report, specifically respondent's identity, was a "public record" as defined by the Open Meetings Act of Missouri, Mo. Rev. Stat. §§ 610.010-610.120 (1978), a/k/a Missouri's "Sunshine Law". In this regard, the Missouri Court

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6. Respondent Hyde did not appeal the dismissal of her petition as against defendants Walter Potter and *Missourian Publishing Ass'n, Inc.*, presumably for the reason that answers to interrogatories disclosed that the unknown assailant allegedly telephoned and harassed her before the *Columbia Missourian* published her identity in its article on August 21, 1980. (A-32)

of Appeals held "that the name and address of a victim of a crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law." (A-16)<sup>7</sup> The court of appeals then held: "In the absence of an obligation imposed by statute, the disclosure of the name and address of the victim-plaintiff [respondent Hyde] by the municipal police department to the reporter [petitioner Brown and Mr. Potter] was *gratuitous*." *Id.* (emphasis added). The court then stated:

We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.

(A-25)

In sustaining respondent Hyde's petition for damages, therefore, the Missouri Court of Appeals ruled that the press could be held liable under a tort theory of negligence for its truthful publication of information lawfully obtained which that court deemed to be of "trivial public concern". (A-25)

The Missouri Court of Appeals overruled petitioners' motion for a rehearing or transfer by it to the Supreme Court of Missouri. (App. C, A-46) Thereafter, the Supreme Court of Missouri denied petitioners' application for a transfer of this case to that court for review. (App. D, A-47)

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7. That the Missouri Court of Appeals erred in its construction of Missouri's "Sunshine Law" is not an issue presented to this Court for review.

## REASONS FOR GRANTING THE WRIT

### I. The First Amendment Forbids The Punishment Of A Newspaper Under A Tort Theory Of Negligence For Its Accurate Publication Of Truthful Information Which Has Been Provided To It By The Government.

Notwithstanding the protections of the First Amendment to the Constitution of the United States,<sup>8</sup> the Missouri Court of Appeals has held, in effect, that the press has a duty to foresee the possibility that its accurate publication of truthful information provided it by the government may enable a third party to commit an intentional criminal act and that the press must either suppress the publication of such information or be held liable in damages for its "negligent" failure to do so.<sup>9</sup>

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8. The First Amendment applies to the states by operation of the Fourteenth Amendment to the Constitution of the United States. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Bridges v. California*, 314 U.S. 252, 268 (1941); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160 (1939); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

9. In reaching this conclusion, the Missouri Court of Appeals relied exclusively upon this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, this Court found it to be within the constitutional power of the states to impose civil liability for a defamation "so long as they do not impose liability without fault . . . ." *Id.* at 347. Ignoring the fact that in *Gertz* this Court was concerned with a defamatory falsehood rather than with a truthful statement of fact, the Missouri Court of Appeals cited this statement from *Gertz* for the proposition that "a plaintiff must prove at least negligence against the publisher." (A-21) The truth or falsity of the offending statement apparently makes no difference in the eyes of the court below. The court below then held that because respondent Hyde's claim is for negligence, "the petition comes validly within the culminated constitutional balance struck by *Gertz* which allows a private redress against a newspaper for a negligent publication of information on a theory of fault free

(Continued on following page)

For the purpose of this petition, petitioners accept the finding of the Missouri Court of Appeals that the identity of respondent was not a public record under Missouri's "Sunshine Law", Mo. Rev. Stat. §§ 610.010-610.120 (1978), but that this information was "gratuitously" given to both newspaper reporters by the police department of Columbia, Missouri. (A-16) Thus, the factual posture of the issue before this Court is not unlike that considered in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), where this Court found that the defendant newspaper "relied upon

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Footnote continued—

from the proof constraints of *New York Times v. Sullivan*, 376 U.S. 254 (1964)]." (A-21) That the "fault" or negligence standard permitted by *Gertz* applies only to actions involving defamatory falsehoods, and not to actions concerning truthful publications, is evidenced not only by the statement in *Gertz* upon which the court below ostensibly relied but also by other portions of that decision. E.g., "At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.' This phrase places in perspective the conclusion we announce today." *Gertz*, 418 U.S. at 348 (emphasis added). Additional evidence that the court below completely misconstrued the applicability of *Gertz* to a lawsuit involving a truthful publication is the fact that *Gertz* was not cited or otherwise relied upon in the majority opinions of this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) or *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), all decisions concerned with the accurate publication of truthful information. The utter ludicrousness of the Missouri Court of Appeals' holding is demonstrated by the decision in *Olivia N. v. Nat'l Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), where the court considered a similar argument and held:

Imposing liability on a simple negligence theory here would frustrate vital freedom of speech guarantees. *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, is also to be distinguished: There the United States Supreme Court recognized the power of the states to impose civil liability for defamation "so long as the States [do] not impose liability without fault." (418 U.S. at p. 339, 94 S. Ct. at p. 3006.) The holding does not extend more broadly to tort liability for speech in areas outside the law of defamation.

*Id.* at 496, 178 Cal. Rptr. at 894 (emphasis added).

routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 103-104. The facts in the case at bar are even more compelling for review by this Court than those presented in *Smith*; here, respondent Hyde's identity was disclosed to the public, specifically the press, "gratuitously" by the government. (A-16)

The narrow issue involved in this case is whether a newspaper in Columbia, Missouri, may truthfully publish the identity of someone identified in records voluntarily disclosed to the newspaper's reporter by the local police department. This case does not involve a broad constitutional challenge to the state's power to keep the identity of victims of crimes or witnesses confidential while the suspect is at large or to punish those who secure information about criminal investigations by illegal means and thereafter divulge it. This case does not involve any claimed constitutional right of access by the press to police reports or information regarding criminal acts. Nor does this case challenge the right of a state to restrain or punish a publication which is directed to inciting imminent lawless action within the meaning of *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The prior decisions of this Court make clear that, regardless of whether a state may deny access to government records and proceedings, the state may not prohibit or punish the truthful publication of information regarding such records or proceedings once that information is obtained by the press unless the substantive evil occasioned by such publication is "extremely serious and the degree of imminence extremely high." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (quoting

*Bridges v. California*, 314 U.S. 252, 263 (1941)).<sup>10</sup> In *Smith v. Daily Mail Publishing Co.*, this Court acknowledged that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.*, 443 U.S. at 102. *Accord*, *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Craig v. Harney*, 331 U.S. 367, 374 (1947); *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the issue concerned whether a state could impose sanctions in the form of a privacy tort for the accurate publication of the name of a rape victim obtained from public records, this Court stated:

[T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

*Id.*, 420 U.S. at 495. The Missouri Court of Appeals distinguished this Court's opinion in *Cox* on the basis that "*Cox* holds no more than that publication of rape victim name information in a [judicial] record already open to the public does not give a basis for an invasion of privacy suit. . . . *Cox* has nothing to do with extra-judicial reports . . . ." (A-44, at n. 25)

The Missouri Court of Appeals totally misconstrued the holding in *Cox*. It ignored the essential underpinnings of that decision as well as several other decisions of this

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10. Petitioners recognize that the right of the press to print what it learns may be limited by such unique circumstances as those discussed in *New York Times Co. v. United States*, 403 U.S. 713 (1971). Such issues as national security are so far removed from the present context that we believe they need not be considered here.

Court. Among those decisions is *Oklahoma Publishing Co. v. Dist. Court*, 430 U.S. 308 (1977), in which this Court in a *per curiam* opinion unanimously reaffirmed its decision in *Cox* and held that the trial court's order enjoining the publication of a juvenile defendant's name and photograph abridged the freedom of the press guaranteed by the First and Fourteenth Amendments. In doing so, this Court noted that: "There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval." *Id.* at 311. The same is also true in the case at bar. Here respondent Hyde not only concedes but affirmatively alleges as the basis for her claim against the City of Columbia, Missouri, that its municipal police department voluntarily disclosed her identity to petitioners. (L.F. 1) Furthermore, the court below found that the municipal police department had done so "gratuitously". (A-16)

This Court's more recent decisions in *Landmark Communications, Inc.*, 435 U.S. 829, and *Smith*, 443 U.S. 97, make clear that *Cox* and the First Amendment protections with which that decision was concerned are not limited to publication of information obtained from "judicial records" or records disclosed in open court. In *Landmark*, the Court struck down a Virginia statute under which *Landmark Communications, Inc.*, the owner of the *Virginia Pilot*, was prosecuted for publishing information concerning the identity of a judge involved in a confidential judicial inquiry proceeding. In doing so, this Court addressed itself solely to the narrow question whether the First Amendment permits the criminal prosecution of the press for publishing truthful information regarding such a proceeding. In concluding that the criminal statute, as applied to *Landmark*, violated the First Amendment, the Court did not concern itself with how the *Virginia Pilot* learned the identity of the judge being investigated.

In *Smith*, the newspaper had learned the name of an alleged juvenile delinquent by monitoring a police band radio frequency and by questioning witnesses, the police and an assistant prosecuting attorney. It then published the juvenile's name in violation of a West Virginia criminal statute. Prosecution of the Daily Mail Publishing Co. upon its indictment under that statute was subsequently held to violate the First Amendment, both by the West Virginia Supreme Court of Appeals and by this Court. With respect to the significance of the source of the information published, this Court stated:

Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information. If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.

*Id.*, 443 U.S. at 103-104 (citations omitted). In so holding, the Court cited *Oklahoma Publishing Co.*, 430 U.S. 308, for the proposition that "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." *Smith*, 443 U.S. at 103 (emphasis added). Similarly, in *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978), this Court stated: "the government cannot restrain communication of whatever information the media acquire—and which they elect to reveal. Cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978)."

In addition to the insignificance accorded by the court below to this Court's decisions in *Cox* and later cases is the court of appeals' characterization of the information published by petitioners as being of "trivial public con-

cern". (A-25) By making such a determination, the court has taken upon itself the role of an editor. That the court plainly cannot do.

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercised the guaranteed freedoms of expression.

*Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-125 (1973). Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), this Court stated:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation . . . can be exercised consistent with First Amendment guarantees . . . as they have evolved to this time.

See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978).

This reluctance to weigh the value of the content of speech is reflected in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). There, in rejecting the "public interest" test enunciated in *Rosenbloom v. Metromedia, Inc.*, 403 U.S.

29 (1971), this Court implicitly held that the "fault" standard should be applied to the conduct of newsgathering and publication and should not constitute an ad hoc review of the "newsworthiness" of the published statement. In rejecting the "public interest" standard, this Court in *Gertz* stated:

[I]t would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "which information is relevant to self-government." *Rosenbloom v. Metromedia, Inc.*, 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges.

*Gertz*, 418 U.S. at 346.

Yet, in the decision below, the Missouri Court of Appeals conducted such ad hoc balancing in applying a *common law* privilege for the publication of matters of "legitimate public concern". (A-23) After acknowledging that the Missouri Supreme Court has held that a criminal event is a matter of legitimate public concern (A-23), the court selected two pieces of information—the respondent's name and address—which were relevant to and a small part of the full report of the incident in question, and found them to be of "trivial public concern". (A-25) The test applied was not a minimal threshold test of general interest, but an ad hoc, after-the-fact balancing of the degree of public interest in this information against the degree of risk that a third party will injure the plaintiff:

Whether the interest of a publisher is sufficiently important to give rise to a privilege to protect it against invasion by the publication of defamatory matter con-

cerning another is akin to whether a duty arises to foresee and protect another against a risk of injury. In each the legal right derives from a preponderant value of the interests in competition.

\* \* \*

We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.

(A-23, 25)

By selectively applying the "public interest" test to isolated facts taken from a report of an event of conceded public interest, the court below decided, in effect, whether the isolated facts were of sufficient public interest to be "necessary" or "relevant" to the report of the event. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), this Court rejected the notion that a jury is free to impose civil liability upon one who publishes a fact which the jury feels is not "relevant" to a discussion of public interest.

A standard of "relevance", . . . especially such a standard applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times*, supra, [376 U.S.] at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.

*Id.* at 276-277.

The First Amendment does not accord the prerogative of censorship of truthful information to a court or jury but preserves that right in the press. Yet, under the opinion below, the press is at the mercy of a court and jury as to whatever it publishes, without regard to its truthfulness or its perceived public significance at the time of publication. It is not for a court or jury to vent their criticism of the press in the guise of a finding that a newspaper was negligent (or did not exercise the proper social concerns) in accurately publishing truthful information. Such a holding would be the death knell of the free press that has been an essential element of our democracy for over 200 years.

**II. Assuming, *Arguendo*, That The First Amendment Permits The Punishment Of A Newspaper For Accurately Publishing Truthful Information Given To It By The Government, Simple Negligence Does Not Constitute A Permissible Standard.**

In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), this Court held that "if the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here." *Id.* at 104. Thus, this Court has apparently left open the possibility that a newspaper's publication of truthful information lawfully obtained may be constitutionally proscribed or punished under certain circumstances. But this Court carefully limited those circumstances; before liability may be imposed, the interests sought to be protected must be far more substantial and in far greater peril than the interests allegedly threatened in the case at bar. "[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be pun-

ished." *Bridges v. California*, 314 U.S. 252, 263 (1941). "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney*, 331 U.S. 367, 376 (1947). See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978).

This Court historically has recognized that the state's power to regulate speech is exceedingly narrow in scope and may be exercised only on a showing of grave and immediate danger to interests which the state may lawfully protect. *Herndon v. Lowry*, 301 U.S. 242 (1937). First Amendment protection has been withdrawn only from certain "narrowly limited classes of speech"; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), such as "obscenity", *Miller v. California*, 413 U.S. 15 (1973), and *Roth v. United States*, 354 U.S. 476 (1957); "fighting words", *Chaplinsky*, 315 U.S. 568 (1942); and "words likely to produce imminent lawless action" (incitement), *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Here the Missouri Court of Appeals creates a new class of prohibited speech, a class which may include all matters which a judge or jury may find to be of "trivial public concern" when compared with subsequent events. The court below stated:

We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication. That duty derives as an 'expression of the sum total of those considerations of policy which

lead the law to say that the particular plaintiff is entitled to protection.' Prosser, *The Law of Torts*, 325-6 (4th ed. 1971). It derives from a balance of interest between the public right to know and the individual right of personal security—between the social value of the right the press advances and the social value of the right of the individual at risk.

(A-25, 26)

A free press cannot survive under such an elusive, abstract standard. The press could never safely publish any information if it were faced with a subsequent balancing by a judge or jury between the "social value of the right the press advances and the social value of the right of the individual at risk." (A-26) Can this standard be employed to impose liability upon the press because thieves learned from an obituary when a decedent's family would be attending a funeral and therefore away from their home, or that an individual in the community had a valuable art collection?

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court implicitly acknowledged the burden placed on an editor who can be held liable for failing to look beyond the face of the story being considered for publication.<sup>11</sup> If it can be argued that a "fault" requirement fails to meet First Amendment standards where the danger from a misstatement was not readily apparent, certainly the argument is overwhelming that a state can-

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11. As previously noted, in *Gertz* this Court held that the "fault" standard of liability could be applied to defamation of a private person where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Id.*, 418 U.S. at 348. However, this Court added that: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.*

not impose liability for an editor's alleged miscalculation of the likelihood of criminal misuse of truthful information related to a matter of public interest.

Presumably such an editor would know that he might later be able to persuade a jury that he exercised "due care", but the burden of speculating on unknown facts and the threat of expensive litigation may more often than not freeze even truthful speech which the editor considers to be undoubtedly newsworthy but also controversial and thus capable of inducing some susceptible person to commit a crime.<sup>12</sup>

In virtually every such editorial decision, the economic cost to the publisher of self-censorship is minimal. In fact, he may eschew "hard news" in favor of the innocuous "lifestyle" or "feature" article, which is both less expensive and risk-free. Indeed, there can be no doubt that if all truthful but potentially "dangerous" information were purged from the news, it would fundamentally change the essential nature of news in this country.

With respect to the state regulation of *conduct*, this Court may find it entirely appropriate for a state to impose on its citizens a burden of foreseeing criminal acts. The same standard applied to *speech*, however, would be an impermissible infringement on First Amendment rights.<sup>13</sup>

The distinction between the regulation of conduct and speech has long been recognized by this Court. The court

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12. "I fear that it may well be the reasonable man who refrains from speaking." *Gertz*, 418 U.S. at 360 (Douglas, J., dissenting).

13. "The jury is a peculiarly majoritarian institution. It brings the voice of society at large into the courtroom. For a jury to decide what a person may do is one thing; for it in the context of libel or any other manner to determine what a person may say is quite another." R. Sack, *Libel, Slander, and Related Problems*, 579, 580 (1980).

below imposes "sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition. See *United States v. O'Brien*, 391 U.S. 367 (1968)." *Cox Broadcasting Corp.*, 420 U.S. at 495.

The interest of the state in protecting the victim of a crime from the speculative possibility of a future criminal act is certainly no greater than the government's interest in protecting the anonymity of a rape victim, *Cox Broadcasting Corp.*, 420 U.S. 469; the anonymity of a youth charged as a juvenile offender, *Oklahoma Publishing Co. v. Dist. Court*, 430 U.S. 308 (1977) and *Smith*, 443 U.S. 97; confidential proceedings of a judicial inquiry and review commission, *Landmark Communications, Inc.*, 435 U.S. 829; a classified study concerning the history of governmental policy in Vietnam, *New York Times Co. v. United States*, 403 U.S. 713 (1971); and information tending to show the guilt of a defendant in an impending criminal trial, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In each of these cases the certainty of harm is far less speculative than in the present case. Yet in each of these cases this Court held that the interests of the government must be subservient to the constitutional guarantees of the First Amendment.

In striking a balance of the social values involved in favor of a negligence standard, the court below stated: "The petition is in negligence. It is the *likelihood* of injury to another that gives rise to the duty to exercise due care" either to suppress the news or be held liable in negligence for the consequences. (A-27, *emphasis added*) Long ago, however, this Court recognized that there must be something more than a "likelihood" that an evil will result from the publication of truthful infor-

mation before the freedoms of speech and press can constitutionally be restrained or punished. In *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940), this Court stated:

Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

Similarly, in *Bridges*, this Court concluded: "[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Id.*, 314 U.S. at 262 (emphasis added).

This proposition was recently reaffirmed in a very different context, one which—if anything—has historically been accorded far less First Amendment protection. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court noted, in reviewing the protections afforded commercial speech, that the state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773 (emphasis added).

These holdings should be reaffirmed especially where, as here, the interests sought to be protected can be achieved by alternative means, such as imposing the duty where it properly belongs—upon the government. Had a statute or prior judicial determination existed which constitutionally proscribed the release of the information here at issue, the state's interest would have been pre-

served without any infringement upon the First Amendment or the press. The choice between the alternatives of infringing upon constitutional liberties and achieving a lawful end by other means has already been determined.

[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us.*

*Virginia State Bd. of Pharmacy*, 425 U.S. at 770 (emphasis added). See also *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973).

Negligence is not a standard which is constitutionally compatible with the right of a free press to publish truthful information which it lawfully obtains. This theory of tort liability would inextricably intertwine the court with the decision-making processes of the press. Such an encroachment upon the freedoms preserved to this time would stifle the free flow of newsworthy information upon which our citizenry and its government ultimately depend. Alternatives exist which adequately protect the interests of the state and, as this Court has repeatedly recognized, the Constitution demands nothing less than that the state choose those alternatives.<sup>14</sup>

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14. In fact, the decision below would appear to accomplish the desired objective by alternative means. The court below not only declared that the information here at issue should be regarded as confidential under Missouri's "Sunshine Law" but further stated that: "[t]he municipal police department, however, was bound to observe the structures of the [Sunshine Law] and did not enjoy the same superseding constitutional favor the First Amendment accords the news media." (A-40, n.19)

## CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the issues raised herein relate to the heart of the First Amendment to the Constitution of the United States. The questions presented by this petition are indeed substantial. We therefore respectfully urge this Court to note probable jurisdiction and set this case down for argument.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Sam L. Colville, a member of the Bar of the United States Supreme Court, hereby certify that 3 true copies of the Petition for Writ of Certiorari were served pursuant to Supreme Court Rule 28.3 by mailing same through the United States Postal Service, First Class mail postage prepaid, on this 10th day of December, 1982, upon the following:

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**(Supreme Court Rule 74.78)**

<b>Fred Dannov</b>	<b>Plaintiff</b>
<b>Terence C. Porter</b>	<b>Defendants Tribune &amp; Brown</b>
<b>Hamp Ford</b>	<b>Defendant City</b>
<b>Dale R. Spencer</b>	<b>Defendants Missourian &amp; Potter</b>

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**YOU ARE HEREBY NOTIFIED** that on the 24 day of December, 1980, the court duly entered the following:

An order to the following effect "Defendants' Motions to Dismiss are sustained. Cause is ordered dismissed with prejudice. Costs taxed against Boone County, Missouri."  
Judge Roper

Maxine Owens  
Clerk of the said Court  
by /s/ (Illegible)  
Deputy

Said notice was mailed to the above addressee on the 24 day of December, 1980.

**APPENDIX B**

**OPINION**

(Filed June 15, 1982)

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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No. WD 32,406

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**SANDRA K. HYDE,**  
**Appellant,**

**vs.**

**CITY OF COLUMBIA, MISSOURI; NATE BROWN,  
TRIBUNE PUBLISHING CO. d/b/a COLUMBIA  
DAILY TRIBUNE; WALTER POTTER, MISSOURIAN  
PUBLISHING ASSN., INC. d/b/a COLUMBIA  
MISSOURIAN,  
Respondents.**

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**An Appeal From the Circuit Court of Boone County  
The Honorable Ellen S. Roper, Judge**

**Before Shangler, P.J., Pritchard and Dixon, JJ.**

The plaintiff Hyde sued the City of Columbia for the negligent disclosure of her name and address by the city police to reporter Brown of the Columbia Daily Tribune and to reporter Potter of the Columbia Missourian and for the negligent publication of that information subsequently

by the newspapers. The petition alleges that on August 20, 1980, after midnight, the plaintiff was abducted and kidnapped by an unknown male assailant but escaped from his car; that she made a full report of that incident to the City of Columbia Police Department; that on that date, the police, without knowledge or authority of the plaintiff, released her name and address to the reporters for publication when the police knew the assailant was still at large; that on that very day the Columbia Daily Tribune published that information and on the next day, August 21, 1980, the Columbia Missourian published that information with the knowledge that the assailant was not in custody. The petition then alleges that the release and publication of her name and address identified the plaintiff to the unknown assailant who thereafter terrorized her on seven different occasions. The petition joined the reporters Brown and Potter, the newspapers Columbia Daily Tribune and Columbia Missourian and the City of Columbia as defendants. The prayer was for actual damages.

The several defendants moved to dismiss the petition on the general ground that the allegations failed to state a claim for relief. The memorandum of reporter Brown and newspaper Columbia Daily Tribune explicated the grounds more specifically: "The plaintiff's petition fails to state a claim against these defendants either as an action for libel, or for the invasion of privacy." The memorandum of the defendant City of Columbia explicated the petition amounted to neither a claim of outrageous conduct nor of an invasion of privacy and that the information disclosed to the press was, in any event, a public record under §§ 610.010 and 610.025, so the disclosure was not actionable. The motions were sustained and the court dismissed the petition with prejudice. The plaintiff appeals the judgment, but only as to the defendants City of Colum-

bia, reporter Brown and newspaper Columbia Daily Tribune.<sup>1</sup>

A petition suffices as against a motion to dismiss if the averments, when accorded every reasonable intendment, invoke a substantive remedy. *Williamson's Estate v. Williamson*, 380 S.W.2d 333, 338[8-10] (Mo. 1964). The pleader need only allege a state of ultimate facts which show the petitioner is entitled to relief and demands such a judgment. Rule 55.05; *Sutton v. Sutton*, 567 S.W.2d 147[1-3] (Mo. App. 1978). The facts asserted in the affidavit of a party [as by response to an interrogatory]<sup>2</sup> are competent to interstice and support a pleading against a motion to dismiss. Rule 55.28, *Litzinger v. Pulitzer Publishing Company*, 356 S.W.2d 81, 87[2,3] (Mo. 1962). The several defendants confront the petition, alternatively, as an attempt to plead the<sup>3</sup> outrageous conduct, invasion of privacy and negligence torts - and, in turn, discount efficacy on each theory. The tenor of the petition, however, as well as the insistent disclaimer by counsel to the court on the motion argument of any other premise of recovery, make clear that the pleader intends only a cause of action in negligence. Actionable negligence encompasses essential proofs: a duty by the defendant to protect the plaintiff from harm, neglect of that duty, and injury to the plaintiff from that neglect. *Stevens v. Wetterau Foods, Inc.*, 501 S.W.2d 494, 498[7,8] (Mo. App. 1973). To plead the ultimate fact of actionable negligence [and hence a substantive remedy well-stated], the petitioner must describe the duty owned by the defendant, the breach the petitioner charges, and the injury which results. *Einhaus v. O. Ames Co.*, 547 S.W.2d 821[4, 5] (Mo. App. 1977).

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<sup>1</sup>The footnotes are arranged in numerical order in the Appendix to the opinion.

The pleadings enlarged by the interrogatory evidence, understood in legal effect, posit that the plaintiff reported the kidnapping and assault to the police as an official account of a crime and not for publication, and that the municipality owed the victim a duty not to disclose her identity and address to the reporter for publication without prior consent - and so protect her from the foreseeable risk of intentional harm by the assailant, when the police knew the assailant was still at large and the practice of disclosure was otherwise forbidden in the circumstances by internal policy,<sup>3</sup> but that the municipality breached the duty and the plaintiff suffered emotional harm from the intentional threats of imminent death and injury proximately caused by the negligent conduct of the City of Columbia. The pleadings understood in legal effect posit also that the defendants reporter and newspaper owed a duty to the victim not to publish her identity and address and so protect her from the foreseeable risk of intentional harm by the assailant, when they knew the assailant was still at large and the practice of publication was otherwise forbidden by internal policy,<sup>4</sup> but that reporter Brown and newspaper Columbia Daily Tribune breached the duty and the plaintiff suffered emotional harm from the intentional threats of imminent death and injury proximately caused by the negligent conduct of the reporter and newspaper.

The several defendants contend, nevertheless, that these averments amount to no duty the law fixes upon them, and so none they are bound to observe. The newspaper defendants contend moreover that such a duty were onerous to the free speech and free press the First Amendment protects, and so not a valid limitation to that exercise. The several defendants argue also that, in any event, a crime against persons report is a *public record*<sup>5</sup> under the Sunshine Law [ §§ 610.010 to 610.120], thus, to give

publicity to information already public can engender no liability.

In negligence jurisprudence, whether a duty exists presents a question of law. Restatement (Second) of Torts § 4 (1965). When the existence of a duty to use due care rests on a relationship between persons, the law has simply placed the actor under obligation for the benefit of another person - the plaintiff - in the given circumstances. Or, more simply, the law has determined that "the interest of the plaintiff which has suffered invasion [is] entitled to legal protection at the hands of the defendant." Prosser, *The Law of Torts* § 37, p. 206 and § 53 (4th ed. 1971). Thus, essential to liability for negligence is a relationship the law recognizes as the basis of a duty of care between the inflictor of injury and the person injured. *Zuber v. Clarkson Construction Co.*, 363 Mo. 352, 251 S.W.2d 52, 55[6, 7] (Mo. 1952). The judicial determination of the existence of a duty rests on sound public policy as derived from a calculus of factors: among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; considerations of cost and ability to spread the risk of loss; the economic burden upon the actor and the community - and others. 1 Dooley, *Modern Tort Law, Liability & Litigation* § 3.03 (Supp. 1981); *Thompson v. County of Alameda*, 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728, 732[7-9] (bank 1980); *Donohue v. Copiague U. Free School District*, 64 A.D. 673, 407 N.Y.S. 2d 874, 877[3, 4] (1978). To these determinants we add that, when the actor is a public agency [or quasi-public institution, such as the press], the role the law assigns to that function. Potter Stewart, "*Or of the Press*," 26 *Hastings L.J.* 631, 633 (1975).

Our law imposes the duty on an actor in some circumstances to foresee that the misconduct of a third person will result in injury to another [the plaintiff] and imposes liability for failure to protect against that risk of harm. *Zuber v. Clarkson Construction Co.*, 363 Mo. 352, 251 S.W. 2d 52, 55[2-7] (1952); Restatement (Second) of Torts § 302B (1965). This principle of liability has scope even where the misconduct of the third person is intentional or criminal. *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. banc 1976) expounds the standard [a paraphrase of Restatement (Second) of Torts § 449 (1965)], l.c. 288[9]:

[I]f the foreseeable likelihood that a third person may act in a particular manner is one of the hazards which makes a person negligent, such an act of a third party, whether innocent, negligent, intentionally tortious or criminal, does not prevent that person from being liable for the harm caused thereby.

See also *Butler v. Circulus, Inc.*, 557 S.W.2d 469, 475 (Mo. App. 1977). Thus, conduct may be negligent solely because the actor should have recognized that it would expose the person of another to an unreasonable risk of criminal aggression. Restatement (Second) of Torts § 448, comment c (1965). In certain situations, the law expects a reasonable actor to anticipate and protect the plaintiff against the intentional or criminal misconduct of a third person whom the actor has given occasion for association with the plaintiff, when the actor knows or should know that the third person is "peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity for temptation for such misconduct." Restatement (Second) of Torts § 302B, comment e, note D (1965). The factors which prompt a reasonable person to such precaution are, among others [Restatement (Sec-

ond) of Torts § 302B, comment f (1965) cited in Scheibel v. Hillis, *supra*, l.c. 288[7, 8]]:

"the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, . . ."

See also *Butler v. Circulus, Inc.*, *supra*, l.c. 475; *Prosser on Torts* § 33, 174 (4th ed. 1971).

The averments of the petition given the most favorable intendment as a negligence cause of action fall within these statements of principle and incidences of tort liability. The allegations by the female plaintiff that she was abducted by an unknown assailant, made escape, then gave official report of the crime [and description of the assailant] to the municipal police, the release of the name and address of the victim by the police to the reporter without her consent and with knowledge that the assailant was still at large, and the publication of that information by the newspaper also with that knowledge, describe conditions which posed an especial temptation and opportunity to the third-party assailant for intentional and criminal aggression upon the victim to her injury, and so plead a *prima facie* breach of duty - unless, as the municipality and newspaper contend, the information was a *public record* under the Sunshine Law and otherwise protected by the First Amendment.<sup>6</sup> The press enjoys no constitutional right to police records. The right of the press for access to governmental records, rather, is no greater than by the public generally. *Pell v. Procunier*, 417 U.S. 817, 850 (1974). The right of the defendant news medium to have the name and address of the victim from the municipal police, therefore, depends upon whether that information was a *public record*.

The common law gave access to public records only where the citizen could show that the purpose of inspection was to vindicate a private or public right. State ex rel. Conran v. Williams, 96 Mo. 13, 8 S.W. 771, 773 (1888). The legislature then enacted §§ 109.180 and 109.190 to open all state, county and municipal records kept under statute or ordinance to personal inspection "by any citizen of Missouri" - a privilege not to be refused "to any citizen."<sup>7</sup> Whatever vestige of a common law interest to enable inspection lingered in §§ 109.180 and 109.190 was swept away by the enactment of the Sunshine Law [§§ 610.010 through 610.120]. That chapter defines a *public record* as *any record retained by or of any public governmental body* [§ 610.010(4)]<sup>8</sup> and then directs that *the public records shall be open to the public for inspection and duplication* [§ 610.015] - subject only to the enumerated exceptions of § 610.025.<sup>9</sup>

The integral Law opens to the public - even without an interest to vindicate - the meetings and records of those entrusted with the public business. Cohen v. Poelker, 520 S.W.2d 50, 52[1] (Mo. banc 1975); State ex rel. Gray v. Bringham, 622 S.W.2d 734, 735[2, 3] (Mo. App. 1981). The enactment exempts from open convocation, the meetings, and from disclosure, the records, enumerated in § 610.025. Thus, the legislators understood that to accomplish that preeminent value of a free society involves a counterpoise of considerations: the openness of public records against the confidentiality essential to the proper conduct of certain governmental operations. Wilson v. McNeal, 575 S.W.2d 802, 805 (Mo. App. 1978). An *arrest* record is made a public record - not by the omnibus definition of § 610.010(4) [*any record retained by or of any public governmental body*] - but by implication of separate § 610.100.<sup>10</sup> The information disclosed by the municipal police depart-

ment to the reporter and published by the newspaper was not from a record of arrest, but from a criminal investigation record. The enumerations of § 610.025 do not exempt from disclosure the investigation records of a law enforcement agency. [In that respect, our Conduct of Public Business [Sunshine] Law stands alone and singular from all other such enactments.] Thus, absent an intention otherwise discernible from the statutory purpose as aided by construction of the text, the records of the criminal investigation process up to the event of arrest are public records and altogether unprotected from disclosure on demand.

The spate of freedom of information and open records enactments [such as our Sunshine Law] which have burgeoned during the past decade or more attest to a community insistence that in a democracy the affairs of government are rightfully conducted in the open.<sup>11</sup> The resultant enactments are of two categories: those which relate to meetings alone [Alaska Stat. § 44.62.310 (1976); Ariz. Rev. Stat. Ann. §§ 38-431 et seq. (1978); Minn. Stat. § 471.705 (as amended 1975), among others] and those which relate to meetings and records - our Sunshine Law, among them.<sup>12</sup> Those enactments, whatever the category, all [the Sunshine Law included] provide that certain governmental business may be conducted in closed session. Those enactments which encompass record, all [the Sunshine Law included] provide that certain governmental records may remain confidential from public disclosure. These enactments all - except for our Sunshine Law - exempt from disclosure records of the criminal investigation process for law enforcement purposes. A typical exemption is 5 U.S.C. § 552(b)(7) of the Federal Freedom of Information Act which excludes from public disclosure:

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. [emphasis added]

Other state enactments are variants of that prototype and refuse to open records which, in addition to the considerations the federal Act delineates, "*endanger . . . the life, health or property of any person*" [S.C. Stat. Ann. § 30-4-40(3)(D) (as amended 1980)] or "*endanger the safety of a witness or other person involved in the investigation.*" [Cal. Gov't. Code § 6254(a) (f) (West) (as amended 1977)]. The exemptions represent a balance struck between the right of the public to know the activity of government and the equally public interest that the records of certain governmental functions remain free from disclosure. Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255, 261[1, 2] (1975); Lodge v. Knowlton, 391 A.2d 893, 895[1] (N.H. 1978); Stephens v. Van Arsdale, 227 Ky. 676, 608 P.2d 972, 981[9] (1980); Northside Realty Associates, Inc. v. Community Relations Commission of Atlanta, 240 Ga. 432, 241 S.E.2d 189, 191[1] (1978). Thus, the several Freedom of Information Acts [other than our Sunshine Law] determine legislatively

that, not only is the efficient suppression and punishment of a crime a function of government so paramount that the disclosure of that governmental activity give way to the need to retain them as confidential,<sup>13</sup> but that the protection of persons upon whom that function impinges serves the same public interest.

The text of these statutes as well as the decisions which construe them determine the public interest, not only in terms of avoidance of impediment to the criminal investigation process,<sup>14</sup> but also in terms of protection of the privacy, the reputation, the person, and the lawful and constitutional prerogatives of those the criminal investigation process enmeshes.<sup>15</sup> The practice of the municipal police department conforms to these exceptions - whatever the formal profession that the reports of crime and consequent investigations are public records under the Sunshine Law. The promulgated rules and policies of the municipal police department, rather, are a careful construct which deliberately balances the public interest in the disclosure of investigative material against the privacy, safety, and legal rights of the persons whom that release of information affects and the public safety function of the department.<sup>16</sup> The municipal police department, as a matter of fact, denies the public access to investigative records which tend to compromise the constitutional rights of an accused to the presumption of innocence and to a fair trial - or those which tend to expose a complainant to embarrassment, loss of privacy or personal harm. In a word, to staunch information otherwise free to flow on request, the municipal agency has fashioned *de facto* exceptions to the Sunshine Law [among them, to deny the public access to the name of a witness who can identify the assailant still at large] other legislatures have established *de jure*. The *de facto* practice of an agency, however, does not amount to legislation. Nor does such a self-determined rule of

nondisclosure, no matter by how fine a balance of public interests, transform records otherwise made public by legislative definition into confidential files.

Our Sunshine Law and the counterpart statutes of the several states [the Federal Freedom of Information Act included] declare a common public policy in favor of open governmental meetings and records. *Cohen v. Poelker*, 520 S.W.2d 50, 52[1] (Mo. banc 1975); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220[1] (1978); *Houston v. Rutledge*, 237 Ga. 764, 229 S.E.2d 624, 626 (1976); *Lodge v. Knowlton*, 391 A.2d 893, 894[1] (N.H. 1978); *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790, 793[1] (1977); *Krause v. Reno*, 366 So.2d 1244, 1250[1] (Fla. App. 1979). These enactments, nevertheless, exempt from disclosure those phases of governmental operations which the public interest requires be kept confidential. Our state shares with all the others the paramount concern of the sovereign to protect the people against public injury and to prosecute those who offend. *State v. Glover*, 500 S.W.2d 271, 274[11-13] (Mo. App. 1973); 21 Am.Jur.2d *Criminal Law* § 1 (1981). These other enactments find that the public interest preponderates to exempt criminal investigation information from disclosure under freedom of information acts. The statutes and decisions of other states, of course, do not determine our legislative public policy nor do they control our judicial decisions. They are apt sources, however, for guidance on common subjects and statutes - especially those which declare a shared policy. *Wilson v. McNeal*, 575 S.W.2d 802, 808 (Mo. App. 1978);<sup>17</sup> *Stephenson v. McClure*, 606 S.W.2d 208, 211[3] (Mo. App. 1980).

Our duty is to give the Sunshine Law the effect the legislature intended. To that end our guides, among others, are: the evil the enactment means to remedy, the assump-

tion that the legislative purpose was a reasonable one, *the presumption that the law was passed for the welfare of the community, that an effective law was intended - and "not an ineffective or insufficient one."* [emphasis added] *Cohen v. Poelker*, 520 S.W.2d 50, l.c. 52 (Mo. banc 1975). To that end also, we look to the integral text and purpose which inform the act as a whole. *Kirkwood Drug Company v. City of Kirkwood*, 387 S.W.2d 550, 554[5] (Mo. 1965). The clear purpose of the Sunshine Law is to open official conduct to the scrutiny of the electorate - but not [as the exemptions attest] at the expense of essential governmental functions or of the vital personal interests of the citizenry. We assume the legislature intended an effective act, one passed for the welfare of the community. *Cohen v. Poelker*, supra, l.c. 52. We assume also that the legislature intended an enactment within constitutional standards. *Kirkwood v. Allen*, 399 S.W.2d 30, 36[6-9] (Mo. banc 1966). We assume also, that the legislature intended an enactment free from unjust, oppressive or absurd consequences. *State v. Tustin*, 322 S.W.2d 179, 182[2, 3] (Mo. App. 1959); *Peper v. American Exchange Nat. Bank in St. Louis*, 205 S.W.2d 215, 221[8, 9] (Mo. App. 1947).

To construe the Sunshine Law to open *all* criminal investigation information to *anyone* with a request subverts neither the public safety policy of our state nor the personal security of a victim - but rather, courts constitutional violations of the right of privacy of a witness or other citizen unwittingly drawn into the criminal investigation process as well as the right of an accused to a fair trial. Such a construction leads to the absurdity [adroitly drawn by the defendants] that an assailant unknown as such to the authorities, from whom the victim has escaped, need simply walk into the police station, demand name and address or other personal information -

without possibility of lawful refusal, so as to intimidate the victim as a witness or commit other injury. We are not free to fashion another formal exception to the Sunshine Law to exclude, even if only presumptively, *every* official entry of the prearrest investigative process from disclosure to the public on request, however egregious we consider the legislative lapse. *Missouri Public Service Co. v. Platte-Clay Electric Cooperative*, 407 S.W.2d 883, 891[12-14] (Mo. 1966). The contours of any such public policy, balanced and counterpoised between the disparate interests in open government and a secure citizenry, is for the legislature. We can - and do - take the enactment as it comes and impart the legislative intent a reasonable consequence - unless no other construction remains possible. *Hawkins v. Smith*, 242 Mo. 688, 147 S.W. 1042, 1045[7] (1912); *State ex rel. Dravo Corporation v. Spradling*, 515 S.W.2d 512, 517[5, 6] (Mo. 1974). To avoid an absurd - even unlawful - application of the statute as written, we determine that the name and address of a victim of crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law.

In the absence of an obligation imposed by the statute, the disclosure of the name and address of the victim-plaintiff by the municipal police department to the reporter was gratuitous. The disclosure served no essential criminal investigation role of the police, but rather was a foreseeable impediment to that function by the encouragement of an obstruction of justice by the assailant. The disclosure was also a threat to the very personal safety of the victim. The deliberate practice of the municipal police department to withhold information of that ilk from the general public attests to the fact that the risk of injury to the victim-plaintiff from disclosure was foreseeable. The petition pleads a state of facts which, taken as true, give rise to a duty by the municipal police to foresee risk

of injury to the victim-plaintiff by the act of the assailant from the disclosure for publication of her name and address. *Zuber v. Clarkson Construction Co.*, 363 Mo. 352, 251 S.W.2d 52, 55[6, 7] (Mo. 1952); Restatement (Second) of Torts §§ 302B and 449 (1965).<sup>18</sup>

The defendant reporter and newspaper contend that the report of the abduction by the victim to the police - facts pleaded in the petition - was her consent to the preparation of the formal crime report and its subsequent publication by the news medium. That argument disregards altogether the duty of citizenship to report criminal conduct - to raise a "hue and cry" of felony to the authorities. *Roberts v. United States*, ..... U.S. ...., 100 S.Ct. 1358, 1363[3] (1980).

That the victim-name-and-address information kept by the municipal police department was by law confidential does not mean that once disclosed to a newspaper it retained its confidential character. Nor do allegations which suffice to plead a cause of action against the official keeper for the negligent release of that confidential record *ipso facto* suffice as a tort cause of action against a news medium for publication of that information. The difference reposes in the favor the Free Speech and Free Press components of the First Amendment display for the autonomy of the institutional press. *New York Times Company v. United States*, 403 U.S. 713 (1971) "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can." Potter Stewart, "*Or of the Press*," 26 *Hastings L.J.* 631, 636 (1975).

The defendants reporter and newspaper contend that the report of crime was a matter of legitimate public concern and interest so that the adjudication of tort liability for the publication of that information were an impermissible interference with the exercise of free speech and of

a free press in violation of the First Amendment.<sup>19</sup> The defendants develop argument in terms of *newsworthiness* of the publication and the status of the victim-plaintiff as a subject of public interest. They apply these considerations and commingle them with the invasion of privacy, outrageous conduct and defamation torts. The petition, however, pleads negligence - a tort which protects an interest distinctive from the other torts. The First Amendment protects a news medium from tortious publication to the extent that the interest in free speech and free press overbalances the governmental interest the tort protects. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), culminates the development of that First Amendment analysis of the accommodation between a free press and the law of torts which began in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).<sup>20</sup>

*New York Times v. Sullivan*, *supra*, held that the First Amendment protects a newspaper from liability for defamatory publications about the official conduct of a public official unless done with actual malice [l.c. 283] - with a knowing falsity or reckless disregard for the truth. That decision rested on the rationale that the First Amendment protected erroneous speech exercised in good faith more than the personal reputation of a public official - and, cognately, that the threat of large damage awards unduly inhibits open debate on public issues. Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 *Hastings L.J.*, 777, 781 (1975). Three years later, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) the *New York Times* constitutional privilege was applied to the tort of invasion of privacy where the subject of the publication was "newsworthy" [the constitutional standard the news media defendants assert to avoid liability to the victim-plaintiff]. That same

year, the constitutional privilege was extended to defamatory publications about "public figures" [Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) and Associated Press v. Walker, 388 U.S. 130 (1967)] - persons who [per Warren, C.J., concurring, l.c. 164] "by reason of their fame, shape events in areas of concern to society at large" and also those who are "intimately involved in the resolution of important public questions." Then, in *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29 (1971) a plurality of the United States Supreme Court averted the focus of inquiry altogether from the *status* of the person defamed [a public figure or public official] to the event reported to determine whether the *New York Times* privilege - and actual malice test - appertained.<sup>21</sup> That constitutional analysis was swept away altogether, however, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

*Gertz* repudiated the public interest-newsworthy test [the principle the news media defendants assert to avoid liability to the victim-plaintiff] in actions for defamation and balanced, rather, the free speech free press values against the cogent state interests in the compensation of private injury to reputation. In that analysis, the Court acknowledged the unique role of the institutional press under the constitution. The Court then noted that [l.c. 344]:

The first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. *Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulner-*

able to injury, and the state interest in protecting them is correspondingly greater. [emphasis added]

The Court then used a normative standard to constrict the *public figure* definition earlier rendered in *Gertz* [l.c. 345]:

[T]hose who attain this [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

It is thus the public figure - private person dichotomy [and not the newsworthiness of the conduct] which determines between a public and private defamation plaintiff - and hence whether the stricture of the *New York Times* constitutional privilege applies.<sup>23</sup> *Gertz* determines also [l.c. 348] "the strong and legitimate state interest in compensating private individuals for injury to reputation" and releases a private person defamed by a news medium publication to the state common law remedy.

To accommodate the free press with the state interest to protect private reputation, *Gertz* struck a final constitutional balance:

The *New York Times* actual malice [knowing or reckless falsity] standard of liability appertains only to the defamation of public officials or public figures. [*Gertz*, l.c. 343]

*The state may not impose liability without fault* [the usual common law rule] against the news media; a

plaintiff must prove at least negligence against the publisher. [Gertz, l.c. 347]

The recovery is limited to compensation for actual damages and compensation for a tort injury. [Gertz, l.c. 348]

A recovery for punitive damages is allowed *only* where upon proof of a reckless falsity the *New York Times* knowing or reckless falsity standard of liability. [Gertz, l.c. 350]

The Gertz constricted definition of *public figure* was reaffirmed in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Then in *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979) the United States Supreme Court once again repudiated *newsworthiness* as a determinant for the application of the *New York Times* privilege against news medium liability and reaffirmed the Gertz public figure - private person test to hold [l.c. 167]: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention" - in that case, a criminal event.

The cause of action the victim-plaintiff asserts against the news medium defendants is for *negligence*, and not on any theory of liability without fault. The events the petition describes are of a private person become unwilling victim of a crime - not of one who has injected her person into a public controversy. The damages she pleads are for actual loss. In sum, the petition comes validly within the culminated constitutional balance struck by Gertz which allows a private redress against a newspaper for a negligent publication of information on a theory of fault free from the proof constraints of *New York Times*. The

question remains then whether under the negligence law of our state the petition pleads a cause of action.

The contentions of the several defendants confront the petition, variously, as a cause of action for defamation, invasion of privacy, and for outrageous conduct. Their constitutional, as well as local law, arguments recite principles apt to defamation and privacy, but not negligence cases.<sup>23</sup> The defendants assume that each of those remedies protects the same private interest. They do not. The defamation remedy protects reputation. *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065 (1942). The right of privacy remedy protects personal sensibility from public disclosure of private facts and from the appropriation of the likeness or name. Restatement (Second) of Torts §§ 652A and B (Tent. Draft No. 13, 1967); Prosser, *The Law of Torts*, 804 et seq. (4th ed. 1971). The outrageous conduct remedy protects against intentional or reckless infliction of emotional distress. *Pretsky v. Southwestern Bell Telephone Co.*, 396 S.W.2d 566 (Mo. 1965). Restatement (Second) of Torts § 46 (1965). The negligence remedy extends to protect against invasion of bodily security even to life itself. It is palpable, however, that whatever the scope of interest these torts protect, when asserted against a news medium publication of official action or other communication in the public interest, each confronts the paramount social utility of a press free to report on topics of public concern. *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065, 1069[9] (1942); *Cook v. Pulitzer Publishing Co.*, 241 Mo. 320, 145 S.W. 480, 489 (1912); Restatement (Second) of Torts §§ 598, 611 and 652D (1976). In such a case, the interest the suitor attempts to vindicate - whether by an action for defamation, or invasion of privacy, or negligence - encounters the privileges and other protections the

common law accords to publications of *legitimate public concern*, otherwise tortious. *Langworthy v. Pulitzer Publishing Company*, 368 S.W.2d 385, 389[9-12] (Mo. 1963); *Tilles v. Pulitzer Co.*, 241 Mo. 609, 145 S.W. 1143, 1152[7] (banc 1912); Restatement (Second) of Torts §§ 598, 611 and 652D (1976); Prosser, *The Law of Torts* §§ 114, 115 (4th ed. 1971).

The determination of what is a matter of public concern is for the court in the first instance [*Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291, 295[9, 10] (1942)] as is the cognate consideration - whether the occasion is one to which a qualified privilege extends [*Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 78 S.W.2d 404, 415[12-16] (1934)]. The privilege obtains, however, only as to information which affects a *sufficiently important public interest*. Restatement (Second) of Torts § 598(a) (1977). Our decisions, under common law precepts, find that a news medium publication of an arrest [*Turnbull v. The Herald Company*, 459 S.W.2d 516 (Mo. App. 1970)], a criminal event [*Langworthy v. Pulitzer Publishing Company*, 368 S.W.2d 385 (Mo. 1963)] and a public warning of crime by a prosecutor [*Woolbright v. Sun Communications, Inc.*, 480 S.W.2d 864 (Mo. 1972)] are matters of legitimate public concern under this principle and so conditionally privileged - absent bad faith. *Perdue v. Montgomery Ward*, 341 Mo. 252, 107 S.W.2d 12, 14[4-6] (1937). Whether the interest of a publisher is sufficiently important to give rise to a privilege to protect it against invasion by the publication of defamatory matter concerning another is akin to whether a duty arises to foresee and protect another against a risk of injury. In each the legal right derives from a preponderant value of the interests in competition. In the case of a defamatory publication [Restatement (Second) of Torts § 594 (1977)]:

*Comment e*

Whether an interest not given direct legal protection is of sufficient importance to give rise to a privilege to protect it against invasion by the publication of defamatory matter concerning another depends upon a comparison of the advantages to the publisher's interest if the defamatory matter should be true, with the harm that will be done to the other's reputation if the defamatory matter should be false. *Thus the value of the interest affected and the serious or trivial character of the defamatory imputation may be important factors in determining whether the interest is thus protected.* [emphasis added]

In the case of a negligent act - publication or otherwise [Restatement (Second) of Torts §§ 291, 292 and 293 (1965)]:

## § 291

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

## § 292

In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

- (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct; etc.

## § 293

In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

- (a) the social value which the law attaches to the interests which are imperiled, etc.

Just as the law does not extend privilege to protect a news medium against the defamatory or invasion of privacy publication of information of trivial public interest,<sup>34</sup> so the law does not impose a duty of care to foresee an injury to another on a slight probability alone, but only on "some probability of sufficient moment to induce the reasonable mind to take precautions which would avoid it." *Zuber v. Clarkson Construction Co.*, 363 Mo. 352, 251 S.W.2d 52, 55[6, 7] (1952).

We have determined that the name and address of the victim-plaintiff prior to the arrest of the assailant was not an official report under the Sunshine Law and so was not a privileged publication under the tenor of that statute or the rules of the common law. That view accords with the rationale of our decisions, the statement of principle in Restatement (Second) of Torts § 611 (1977) and other sound authority. *Cianci v. New York Times Publishing Company*, 639 F.2d 54, 70 (2d Cir. 1980); *Lancour v. Herald & Globe Ass'n*, 111 Vt. 371, 17 A.2d 253 (1941). We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.

That duty derives as an "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Prosser, *The Law of Torts*, 325-6 (4th ed. 1971). It derives from a balance of interests between the public right to know and the individual right to personal security - between the social value of the right the press advances and the social value of the right of the individual at risk. Restatement (Second) of Torts §§ 291-293 (1965). It derives from the social consensus that common decency considers such information of insignificant public importance compared to the injury likely to be done by the exposure.<sup>25</sup> Restatement (Second) of Torts § 652D, comments *g* and *h* (1977). It derives from "the known character, past conduct and tendencies of the person [assailant] whose intentional conduct causes the harm, the temptation or opportunity which the situation [publication] may afford him for such misconduct, the gravity of the harm which may result." [*Scheibel v. Hillis*, 531 S.W.2d 285, 288[7, 8] (Mo. banc 1976)] Restatement (Second) of Torts 302B, comment *f* (1965)] - the likelihood in the circumstances that the assailant still at large will threaten, attempt an intentional harm or a criminal obstruction of justice to prevent the victim from a confirmed identification and prosecution of the assailant. The petition does not contest the truth of the publication nor assail an unpopular opinion. It does not tend the medium to that course of self-censorship which offends a free press, but engenders an attitude of due care for the safety of one likely to be harmed from the reportage of trivial information. To delete the name and address of the abduction victim from the news medium publication<sup>26</sup> would impair no significant news function nor public interest in the reportage of crime and apprehension of criminals. To report that information when the assailant can be iden-

tified - as the news publication clearly informs - rather, encourages not only a likelihood of injury but of additional crime.

The petition of the victim-plaintiff taken at most favorable intendment states a cause of action in negligence against the news medium defendants free from the proof constraints of *New York Times v. Sullivan* as well as any constraints of common law privilege. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979); *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065, 1073[15, 16] (1942); Restatement (Second) of Torts § 580B comments d to f (1977).

The municipal defendant contends finally that - a legal duty to the plaintiff and a breach of that duty assumed - nevertheless the petition does not allege a physical injury and so does not state a cause of action in negligence. The argument goes that "absent physical injury or malicious, wilful, wanton and inhuman conduct" our law does not permit recovery for mental distress - the only injury the petition pleads.<sup>27</sup>

The petition is in negligence. It is the likelihood of injury to another that gives rise to the duty to exercise due care. The test of negligence liability is foreseeability: that the actor knows or has reason to foresee that the act involves an unreasonable risk of injury to another but fails to protect against that hazard. *Mrazek v. Terminal R. Assn. of St. Louis*, 341 Mo. 1054, 111 S.W.2d 26, 29[5-7] (1939); Restatement (Second) of Torts § 284(a) (1965). Negligence liability results therefore when a breach of duty causes damage. The duty is not to protect against every possible injury which might follow upon the conduct, however, but only from a reasonably foreseeable danger. *Schlegel v. Knoll*, 427 S.W.2d 480, 484[8, 9] (Mo. 1968).

Our law holds to the view that a reasonable actor under a duty of care to another does not foresee mental distress unconnected with physical injury as a consequence of a breach of that duty. *Brisboise v. Kansas City Public Service Co.*, 303 S.W.2d 619, 626[3] (Mo. banc 1957); *Bass v. Nooney Company*, ..... S.W.2d ..... (Mo. App. E.D. No. 42989 adopted February 2, 1982). The rationale for that rule of damages rests on the fundamental premise that [contradistinctively from torts intentionally inflicted] "it is reasonable to hold persons who are merely negligent bound to anticipate and guard against fright and consequences of fright." *Crutcher v. Cleveland C., C. & St.L.R.R.*, 132 Mo. App. 311, 111 S.W. 891, 893 (1908). That rationale rests the recovery of damage on the distinction between conduct only negligent [*McCardle v. George B. Peck Dry Goods Co.*, 271 Mo. 111, 195 S.W. 1034, 1036 (1917)] and conduct actuated by a state of mind [*Trigg v. St. Louis, K.C. & N. Ry. Co.*, 74 Mo. 147, 153 (1881)]. Prosser, *The Law of Torts* § 31, 145 (4th ed. 1971):

"Negligence is conduct, and not a state of mind." . . . The standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and a failure to conform to it is negligence, even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance. The almost universal use of the phrase "due care" to describe conduct which is not negligent, should not be permitted to obscure the fact that *the real basis of negligence is not carelessness, but behavior which should be recognized as involving unreasonable danger to others* . . . In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such

consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them. If an automobile driver runs down a man in the street before him, with the desire to hit him, or with the belief that he is certain to do so, it is an intentional battery; but if he has no such desire or belief, but merely acts unreasonably in failing to guard against a risk which he should appreciate, it is negligence. [emphasis supplied]

The rule of damages rests on at least the reason, therefore, that mental distress is a less probable consequence of negligent conduct and a more certain consequence of intentional conduct. Thus in the absence of an *independent basis for tort liability for mental distress as a foreseeable element of the duty*, a negligent actor has no liability - under our decisions - for mental injury unrelated to a physical injury.

Our law imposes *liability in negligence for an intentional injury* where the original actor creates a condition which he knows or should foresee will give occasion to a third person to commit an intentional injury upon the plaintiff. *Scheibel v. Hillis*, 531 S.W.2d 285, 288[7, 8] (Mo. banc 1976); *Zuber v. Clarkson Construction Co.*, 363 Mo. 352, 251 S.W.2d 52, 55[6, 7] (Mo. 1952); Restatement (Second) of Torts §§ 302B and 449 (1965). In such case, the injury from the intentional tort - because foreseeable at the time of the original conduct - becomes a component of the original foreseeable risk of injury and so a compensable damage in the negligence recovery. *Price v. Seidler*, 408 S.W.2d 815, 821[8-10] (Mo. 1966); Restatement (Second) of Torts § 448 (1965); Prosser, *The Law of Torts* § 44 (4th ed. 1971). That is so whether the subsequent intentional misconduct concurs or even independently intervenes to combine with the negligent conduct of the original actor.

Christiansen v. St. Louis Public Service Co., 333 Mo. 408, 62 S.W.2d 828, 830[1] (1933); Dickerson v. St. Louis Public Service Co., 365 Mo. 738, 286 S.W.2d 820, 824[3-5] (banc 1956); Price v. Seidler, 408 S.W.2d 815, 821[8-10] (Mo. 1966). If the conduct of the original actor was a *substantial factor* to bring about the harm, that the injury was inflicted by a subsequent independent act even of the quality of a crime or an intentional tort does not relieve the original actor for *liability in negligence*. Scheibel v. Hillis, 531 S.W.2d 285, 288[7-9] (Mo. banc 1976); Prosser, The Law of Torts § 44, 270 (4th ed. 1971); 1 Dooley, Modern Tort Law § 3.12 (1977).

We have determined that the petition enhanced by the facts of discovery, at best intendment, pleads a cause of action against the several defendants in negligence for the intentional infliction of injury upon the victim-plaintiff by the third-person assailant. These pleadings and facts of discovery, at best intendment, allow inference that the past conduct, reported character and tendency of the third-person assailant to violence, were known or reasonably knowable to the several defendants so that it was reasonably foreseeable that the publication of the name and address of the victim, while the assailant was still at large, was a temptation to that third person to inflict an intentional harm upon the victim-plaintiff - a foreseeable risk the several defendants had a duty to prevent. Scheibel v. Hillis, 531 S.W.2d 285, 288[7-9] (Mo. banc 1976); Restatement (Second) of Torts § 302B, comment f (1965). The facts of the petition describe conduct by the third-person assailant upon the victim equivalent to a criminal obstruction of justice or a civil intentional assault tort. That species of tort involves an invasion of personal integrity. Restatement (Second) of Torts § 21 (1965). It amounts to an unlawful *offer or attempt to injure another*

so no actual physical contact is necessary to complete that intentional tort. *Adler v. Ewing*, 347 S.W.2d 396, 402[12-17] (Mo. App. 1961). Thus, the tort protects a plaintiff against a purely *mental* disturbance. Prosser, *The Law of Torts* § 10 (4th ed. 1971). That the petition pleads a mental distress injury inflicted on the victim-plaintiff by the intentional independent tort of the third-party assailant does not render the original breach of duty of the several defendants to protect against that foreseeable conduct any less negligent nor the mental distress injury beyond the recovery the negligence petition pleads.

The judgment of dismissal is reversed and remanded with directions to the trial court to reinstate the petition against the defendants on appeal.

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Charles Shangler, Presiding Judge

All concur.

## APPENDIX

<sup>1</sup>The motion to dismiss of the defendants, reporter Potter and newspaper Columbia Missourian, does not appear in the record on appeal. That these defendants did move dismissal is evident from the transcript of the hearing on the motions to dismiss. The arguments of counsel and discussions *inter sese* disclosed that the answers made by the plaintiff to interrogatories by the defendants Potter and Columbia Missourian showed that the unknown assailant called and harassed the plaintiff twice [presumably on the day of the event when the Columbia Daily Tribune had already published the name and address of the plaintiff Hyde] before that information was republished by the Columbia Missourian on the next day, August 21, 1980. The defendant Columbia Missourian argued, and formally moved on the basis of the interrogatory answers, dismissal for want of causation between the later publication of name and address and any injury to the plaintiff. That supplementary motion to dismiss by defendants Potter and Columbia Missourian is not part of the record nor does any disposition by the court appear. In any event, the plaintiff does not appeal the judgment in favor of those defendants so that any such dearth of a record does not hamper review.

<sup>2</sup>The responses to the interrogatories submitted by the respective parties to the others are compended as part of the transcript on appeal and those were argued, in legal effect, by the plaintiff as facts constituent of the pleaded negligence causes of action.

The response of the City of Columbia [through the police department] disclosed the record of the crime against person report made by the plaintiff Hyde to the Columbia police in the early morning of August 20, 1980 - when the alleged abduction and assault were committed upon the plaintiff - and the numerous supplemental report records of the successive reports by the plaintiff of the threats, encounters, and harassments of the unknown assailant from that date until October 20, 1980, when the case was officially closed "pending further leads."

The crime against person report made by the plaintiff Hyde on August 20, 1980, was that as she walked along Broadway [in Columbia] shortly after midnight, a white male in his late twenties, with red hair and red beard, opened the door to his red Mustang automobile, levelled a sawed-off shotgun at her and ordered her into the car and once inside, he kept the weapon trained on her and ordered: "You will do what I want you to do or I will blow your brains out." When the car started up and the assailant started to turn, his attention was distracted, so the plaintiff opened the door and jumped out. The assailant clung to her dress so that the garment tore, but she escaped. She ran down the street to a nearby disco to report the incident to the police and saw the assailant drive by twice while she awaited their arrival.

The supplemental crime against person records show that on the very night of the event - August 20, 1980 - the plaintiff reported to the police that the assailant drove up to her duplex in the Mustang and read the house number. That incident occurred after the defendant Columbia Daily Tribune published her name and address. Then, another supplemental report shows, on August 22, 1980, in the early morning the plaintiff saw lights in her driveway and observed a red Mustang there. On that occasion, she saw the man place his shotgun on top of the Mustang, look at the residence for a moment, and then drive away. The plaintiff reported the incident to the police, and they responded. The very next day, on August 23, 1980, the plaintiff reported that as she was in the kitchen, she saw the red-bearded assailant at her back door; she fainted, and when revived, told her male companion, but by then he could detect no one outside. While he searched, the plaintiff received a telephone call and was told: "I'm glad you're not dead yet, I have plans for you before you die." The incident was also reported to the police. The police records contain numerous other incidents, among them, an encounter with the assailant at a tavern where she was with friends; at least another confrontation outside her home; a chase of the red-bearded male in the red Mustang by the male companion of the plaintiff.

Then again, at her place of employment, on October 6, 1980, the plaintiff reported that as she attended a customer, she received a telephone call by a person who asked for her by name and then said: "I wanted to refresh your memory of who I am before I kill you tonight." Ten minutes later, a woman came in [whom the report describes in detail], asked for her by name and then told her: "Well, someone outside wants to talk to you, back on the lot." The plaintiff finished with a customer and went outside and saw the red Mustang in the car lot and the assailant in the car who pointed a shotgun at her and conveyed to her the threat to kill her that night.

The responses to interrogatories revealed also that the City of Columbia Police Department promulgated a Press Policy by a series of General Orders which were in effect at the time of the crime reported to the department by the plaintiff. General Order 79-22 promulgated the Press Access to Crime and Arrest Reports policy of the department:

#### **"PROCEDURE**

Copies of all police offense reports dealing with any offense shall be sent to the Press Officer, and only he shall release information to the news media except as provided for below. *Under no circumstances shall copies of police offense reports dealing with major felony crimes, such as murder, rape, robbery, and arson be released to the news media.* In lieu of releasing these reports, the department's Press Officer (or in his absence the Watch Commander) shall issue a press release following the guidelines outlined in this General Order . . . . .

. . . . .

**"I. BEFORE ARREST****A. Releases may contain the following information:**

1. Location and time of the offense.
2. A description of the exact offense including a brief summary of events.
3. Injuries resulting from the action.
4. *Identity of the victim, except for a sex crime victim or a victim who can positively identify the assailant.*
- 5, 6, 7 . . . etc.

**B. Releases may not contain the following information:**

. . . . .

4. *Identity of witnesses, including a victim who can positively identify the assailant.*
5. *Identity of sex crime victims.* (The information should be general - race, sex and age).

[emphasis added]

The responses to interrogatories revealed also that the newspaper Columbia Daily Tribune also followed a policy not to publish the name of a crime victim who was the victim of an attempted or actual sexual offense - and that this policy "[is] based on the police department's classification of the crime." The decision to print the name and address of plaintiff in the August 20, 1980, account of the crime was made by Editor Carolyn White.

<sup>9</sup>The policy embodied in the General Orders does not, of course, establish a standard of care, which if breached, constitutes negligence. The policy, however, is probative of the conduct exacted of a reasonable actor in the circumstances and ~~as~~ a breach of that standard is evidence of negligence. *Elliott v. St. Louis Southwestern Railway Co.*, 487 S.W.2d 7, 15[9, 10] (Mo. 1972); 1 Dooley, *Modern Tort Law* §§ 3.25-3.29 (1977). The elements of the General Orders which bear on the negligence theory the plaintiff asserts against the City of Columbia and which, by reference to the petition allegations further defines the cause of action both in terms of the specific breaches of duty and the expected proof include: the breach of General Order 79-22 Before Arrest policy paragraph A 4, in that the police disclosed her identity although she was both a "sex crime victim" or, if not, then "a victim who can positively identify the assailant." [The initial crime against person report records that the plaintiff-victim gave a detailed description of the assailant to the police and stated "she was sure that she could identify the subject if she observed him again." That report also included her information that the assailant did not strike her or otherwise attempt to molest her while they were in the automobile. The plaintiff is entitled to the best effect of her pleading and in-terstitial evidence on the motion to dismiss, however, and her

reported statement does not preclude inference that the assault put her in peril of sexual attack. [Rule 55.28].

<sup>4</sup>The responses to interrogatories by the defendants reporter and newspaper disclose an unwritten policy in effect on August 20, 1980, that the Columbia Daily Tribune would not print the name of a female victim of an attempted or actual sexual offense. The responses explain that those practices "are based on the police department's classification of the crime." The police department's "classification of the crime" for the purposes of its nondisclosure policy, however, encompasses also a victim [who] can positively identify the assailant [the plaintiff]. The petition does not plead in *haec verba* that the reporter and newspaper breached a self-imposed duty of nonpublication, but the verified facts in the answers to the interrogatories, once again, were competent evidence to complete the intervals of the petition as against a motion to dismiss [Rule 55.28]. Taken most favorably to the negligence cause of action, and for the purpose of the motion to dismiss for failure to state a cause of action, those facts allow inference - not only that the defendants reported and published the identity of a female victim of sexual assault - but also that the newspaper policy of nondisclosure was coextensive with the police department policy of nondisclosure and so encompassed also "a victim [the plaintiff] who can positively identify the assailant."

<sup>5</sup>It is evident that the several defendants do not treat all crime against persons reports as public records. The practice of the police department under the written delineation of policy [and given acquiescence by the reporter and newspaper by unwritten policy] excludes from disclosure the identity of a female victim of an attempted or actual sexual offense - as well as where the victim can positively identify the assailant [General Order 79-22, BEFORE ARREST, A. 4.; B. 4.]. Other components of that General Order exclude numerous other categories of information from release - such as information about unidentified suspects, "misleading or false information," identity of suspects interviewed but not charged, among the several others. In addition, other PRESS POLICY General Order 78-15, among others, and the Rules and Regulations of the City of Columbia Police Department disclose that the release of information to the news media is selective [Rules and Regulations, Chapter 1, 420.50]:

"The scope and content of each release of information must be determined according to the facts of each situation."

The defendant municipality does not say how a record can be public under the Sunshine Law and yet be withheld from disclosure, nor what authority of law commits that discretion to the recordkeeper [see § 610.025.5].

<sup>6</sup>We continue to assume that the circumstances described in the petition as intersticed by the responses in support give rise to a duty by the municipal and news medium defendants to the plaintiff the law protects. We defer that assessment, as a principle finally determined, until we resolve the contentions

that the name and address of the victim were public information and that the publication was otherwise constitutionally protected.

<sup>7</sup>The expansive scope of disclosure the § 109.180 terminology portends, however, is qualified by the § 109.190 provision that the right to photograph public records extends to "all cases where the public or any person interested has a right to inspect." [emphasis added] That the statute does not discard altogether the common law precondition of interest to qualify for access to the public records becomes evident from the sparse judicial authority to construe the §§ 109.180 and 109.190 enactments. See *Kirkwood Drug Company v. City of Kirkwood*, 387 S.W.2d 550, 555[8] (Mo. 1965); *State ex rel. Collins v. Donelson*, 557 S.W.2d 707, 710[4] (Mo. App. 1977).

<sup>8</sup>Section 610.010(2) defines "Public governmental body" as: any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power . . . .

The litigants do not contest that the City of Columbia and its police department function constitute a *public governmental body* under the Sunshine Law.

<sup>9</sup>Section 610.025. *Closed meetings authorized, when*

1. Any meeting, record, or vote of judges, or a jury during the deliberation of a verdict, meetings of a grand jury, juvenile court proceedings, and court proceedings involving legitimacy, illegitimacy, adoption, or probation and proceedings involving parole may be a closed meeting, closed record, or closed vote.

2. Any meeting, record or vote pertaining to legal actions, causes of action, or litigation involving a public governmental body, leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor may be a closed meeting, closed record, or closed vote.

3. Any meeting or record of the state militia or national guard or any part thereof may be a closed meeting or closed record.

4. Any nonjudicial mental health proceedings and proceedings involving physical health, scholastic probation, scholastic expulsion or scholastic graduation, welfare cases, meetings relating to the hiring firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote.

5. Other meetings, records or votes as otherwise provided by law may be a closed meeting, closed record, or closed vote.

<sup>10</sup>Section 610.100. "Arrest records, closed, when—expunged, when.

—If any person is arrested and not charged with an offense against the law within thirty days of his arrest, official records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records except as provided in section 610.120." [emphasis added]

See *Herald Company v. McNeal*, 553 F.2d 1125, 1129 n.7 (8th Cir. 1977).

<sup>11</sup>The purpose of the Federal Freedom of Information Act, 5 U.S.C. § 552 et seq., a prototype for such statutes, was given by the United States Supreme Court in *National Labor Relations Board v. Robbins Tire and Rubber Company*, 437 U.S. 214 (1978), l.c. 242: "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." See also *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980).

That sense of purpose also informs the numerous state enactments which include a declaration of policy in the legislation: For instance: Ark. Stat. Ann. § 12-2802 (as amended 1976): "Declaration of Public Policy - It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy . . ."; Maine Rev. Stat. Ann. tit. 1, § 401 (1975): Declaration of public policy, etc.: "The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business . . ."

<sup>12</sup>*Wilson v. McNeal*, 575 S.W.2d 802 (1978) l.c. 809, n.5 enumerated twenty-eight such enactments at the time of decision, the Federal Freedom of Information Act, excluded. We count eleven more [Colorado, Georgia, Hawaii, Kansas, Montana, Nebraska, New Hampshire, North Dakota, South Carolina, Tennessee and Texas] and the District of Columbia, also.

<sup>13</sup>The public policy that the criminal law shall not be impeded is so cogent that the Attorney General of South Carolina by opinion (Op. Atty. Gen., No. 77-193, p. 146] simply advised that police criminal investigatory files were not public records under the South Carolina Freedom of Information Act of 1976-77, even though those records were not among those enumerated for exemption under that statute. The statute was immediately amended to exclude from disclosure records of law enforcement and public safety agencies in numerous particulars. S.C. Stat. Ann. § 30-4-40 (as amended 1980).

<sup>14</sup>The protection of confidential sources, confidential information, confidential investigative techniques, the safety of law enforcement personnel among others, are considerations often cited in the statutes and decisions which the public interest requires be given precedence over the open access to that information 5

U.S.C. § 552(b) (7); Cal. Gov't. Code § 6254(f) (West) (as amended 1977); Conn. Gen. Stat. Ann. § 1-19(b) (1977); Ill. Rev. Stat. § 102-42-2 (as amended 1977), among the other enactments; N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Lodge v. Knowlton, 391 A.2d 893 (N.H. 1978); Jensen v. Schiffman, 544 P.2d 1048 (Or.App.1976) among the other decisions.

<sup>15</sup>The numerous statutes protect, variously, against disclosures of information gleaned during the criminal investigation process which constitute an "unwarranted invasion of personal privacy" [5 U.S.C. § 552(b) (7); Conn. Gen. Stat. Ann. 1-19(b) (1977); Cal. Gov't. Code § 6254(c) (West) (as amended 1977)], or "would endanger the safety of a witness or other person involved in the investigation" [Cal. Gov't. Code § 6254(f) (West) (as amended 1977) [emphasis added]; Mich. Stat. Ann. § 4.1801 (13) (1) (t) (vii) (1976)], and also the right to a fair trial [5 U.S.C. § 552(b) (7); Mich. Stat. Ann. § 4.1801 (13) (1) (b) (1976)]. Thus, the exceptions to the open records acts are designed, as a matter of public interest, to preserve the constitutional rights of privacy and to a fair trial, among others.

A pervasive judicial rationale exempts investigative files from disclosure because such records "are apt to consist of remarks, gossip, guesses, impressions, hearsay, irrelevant information, comments, surmises, data and facts." *Wilson v. McNeal*, 575 S.W.2d 802 (Mo. App. 1978). [Wilson deals with records "relating to hiring, firing or promotion of a public governmental body" exception to the Sunshine Law [§ 610.025] it dealt with the role of entries in the course of an internal affairs police personnel investigation, and does not bear further on our concern. We note, nevertheless, that the police report records before us as responses by the Columbia municipal police department to the interrogatories of the plaintiff fulfill that judicial surmise and suggest urgent reason for a legislatively-defined police investigation exemption to the Sunshine Law definition of public records.

<sup>16</sup>Columbia Police Department—Rules and Regulations, Chapter I

1-420.20 ROLE OF THE DEPARTMENT. The Department actively seeks to establish a cooperative climate in which the news media may obtain information on matters of public interest in a manner which does not hamper police operations. However, certain information must be withheld from the news media in order to protect the constitutional rights of an accused, to avoid interfering with a Department investigation, or because it is legally privileged.

1-420.50 SCOPE AND CONTENT OF THE RELEASE OF INFORMATION. The scope and content of each release of information must be determined according to the facts of each situation. Generally, a description of the circumstances which is not legally privileged and which will not prejudice

*the rights of suspects or interfere with an investigation will be made . . . .*

1-440.10. REQUESTS FOR INFORMATION. The public has an abiding interest in law enforcement and in the activities of the Department. The news media and members of the public frequently direct inquiries to the Department seeking information on a variety of subjects. While it is the aim of the Department to fulfill such requests, it is not always possible to do so. *Whether to release information or to grant interviews will be determined according to the facts of each case."*

Nor are the contents of the offense reports, even of lesser felonies, released in whole upon request. The practice is otherwise. General Order 79-22 delineates precisely the information the municipal police department will release, and which it will not release. As we noted, General Order 79-22 does not allow disclosure of the identity of a victim of a sexual crime who can positively identify the assailant, before arrest. Nor does that General Order allow the release of the identity of a witness [to any crime], including a victim who can positively identify the assailant. Even after arrest that General Order prohibits the release of comments in the record about the "character or reputation of the defendant" or of "the refusal of an accused to make a statement." These strictures merely reflect the Policy of the police department [General Order 79-22, Policy 2] to "[p]rotect the rights of the accused by restricting pretrial publicity."

<sup>17</sup>Wilson, *supra*, resorted to the texts of numerous counterpart open records statutes to support decision that the "relating to the hiring, firing or promotion of personnel of a public governmental body" exception to the Sunshine Law [§ 610.025(4)] did not require the agency to open the investigative records to the public even after the personnel proceeding terminated and was closed.

<sup>18</sup>The existence of a duty the law of negligence recognizes and redresses upon breach, we noted *supra*, is a serious determination of public policy derived from factors of an interest worthy of protection, the moral blame society attaches to the conduct, etc., and also the economic burden upon the actor and community. See *Thompson v. County of Alameda*, 27 Cal.3d 741, 167 Cal. Rptr. 70, 614 P.2d 728, 732[7-9] (bank 1980) and 1 Dooley, *Modern Tort Law, Liability & Litigation* § 3.03 (Supp. 1981). The appeal presents only the petition stage of litigation. There are no responsive pleadings before us, and hence no affirmative defenses. The question whether a municipal instrumentality [and hence the community] shall be exposed to tort liability and the cost of reparation, of course, is one of a basic public policy - now finally determined by our legislature by the enactment of Sovereign Immunity §§ 537.600 and 537.610, RSMo Supp. 1981. See *Bartley v. Special School District of St. Louis County*, \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Mo. App. E.D. No. 44396, adopted February 2, 1982); *Carmelo v. Miller*, 569 S.W.2d 365 (Mo. App. 1978),

<sup>19</sup>That brief argues also that the dismissal of the petition was proper because the news medium defendants merely gave further publicity to information already public. We have determined that the name and address of the victim under the circumstances pleaded was not public information under the Sunshine Law. Nor was that information a component of an arrest report - and so a public record under §§ 610.100 and 610.105, nor a judicial record - and so open to the public and news media alike. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975).

The defendant municipality also argues the public interest of the subject matter of the publication to justify disclosure to the news medium in the first instance. The municipal police department, however, was bound to observe the strictures of the statute [Sunshine Law] and did not enjoy the same super-seding constitutional favor the First Amendment accords the news media. That the information was a matter of public interest, therefore, would not excuse that initial disclosure and the breach of confidentiality the statute imposes on the record-keeper.

If the argument intends to assert that the disclosure to the news medium was an exercise of the qualified privilege allowed the police to communicate information attendant to the performance of an official duty - not otherwise opened by the Sunshine Law - the common law rule of qualified privilege applies only to subserve a *substantial interest of the public*, such as the prevention of crime and the apprehension of criminals. *Woolbright v. Sun Communications, Inc.*, 480 S.W.2d 864 (Mo. 1972). The fact of an arrest [as the terms of § 610.100 of the Sunshine Law imply] is also such a matter of public interest as to enjoy the protection of a qualified privilege as to its contents under the common law. *Turnbull v. Herald Company*, 459 S.W.2d 516 (Mo.App.1970). The fact of a crime is also such a matter of public interest as to invoke the common law qualified privilege on behalf of the police official as well as the newspaper publisher of the event. *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo.1963). "On the other hand, statements made by the police or by the complainant or other witnesses . . . as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged . . . ." Restatement (Second) of Torts § 611, comment h (1977).

We should note, since the several defendants argue the term *public interest* without differentiation as to its constitutional as distinct from its common law content, that the privilege of a police officer to communicate official information to another appertains only as to statements made in the proper exercise of the official duty - such as to allay a public danger. *Woolbright v. Sun Communications, Inc.*, *supra*. See Restatement (Second) of Torts §§ 598 and 598A and comments (1977). The privilege of a news medium to communicate on a matter of public or general interest rests on constitutional principles we discuss *infra*.

<sup>20</sup>The defendants cite Missouri cases since dated by later First Amendment development [Williams v. KCMO Broadcasting Division, etc., 472 S.W.2d 1 (Mo.App.1971), among others]. These cases, although superseded in terms of federal constitutional principle nevertheless remain relevant [as Gertz, supra, holds] to both define the state interest and the local rules of law which delimit remedy.

<sup>21</sup>The rationale of that analysis was a three-justice judgment concurred in by two other justices, [per Brennan, J., l.c. 43]:

"If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. *The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.*" [emphasis added]

<sup>22</sup>The Gertz rationale also presumably repudiates the *news-worthiness* test for the application of the *New York Times* privilege to a case of invasion of privacy in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 250 (1974); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 85 N.6 (D.C.App.1980); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal.L.Rev. 935 (1968).

<sup>23</sup>For instance: *Glover v. Herald Company*, 549 S.W.2d 858 (Mo. banc 1977) cited by the news medium defendants for the general argument that the "*New York Times* and cases of that genre are applicable to the press in Missouri" decides only that as to a public official the *New York Times* privilege standard for liability still applies - a matter not relevant nor disputed by the implications of petition brought by a private individual.

*Williams v. KCMO Broadcasting Division, etc.*, 472 S.W.2d 1 (Mo.App.1971) was an action for invasion of privacy by one caught up in a mass arrest procedure - then transmitted to the public by television although he committed no crime. The case was decided on the principle of public interest and, implicitly, that the plaintiff became a public figure by involuntary involvement in a news event - standards later rejected altogether in *Gertz*. The numerous federal authorities cited [l.c. 4] have since been dated by *Gertz*, *Firestone* and *Wolston* - among other United States Supreme Court declarations.

*Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065 (1942) was a defamation action, not against a news publisher, but against an employer for the alleged libel contained in a court suit pleading. The opinion dealt with the common law principles of absolute and qualified privilege as they appertained to a record in a judicial proceeding, and so is not relevant to the information which forms the basis of the negligence petition before us.

<sup>24</sup>Restatement (Second) of Torts § 611 (1977) deals with the privilege which attends the publication of defamatory matter concerning another in the report of an official action - such as a police arrest. The basis of the privilege [comment a] is the interest of the public in information as to what occurs in official proceedings and public meetings. We have found that the name and address information of the victim while the identifiable assailant was still at large was not a public record either under the Sunshine Law or under the common law. Since the purpose of the privilege [comment i] "is to protect those who make available to the public information concerning public events that concern or affect the public interest, . . . the privilege does not extend to a report . . . that does not deal with matters of public concern . . . ." [emphasis added]

Restatement (Second) of Torts § 652D (1977) deals with liability for the publicity invasion of the private life of another, *if the matter publicized is of a kind that*

- "(a) would be highly offensive to a reasonable person, and
- (b) *is not of legitimate concern to the public.* [emphasis added]

\* \* \* \* \*

"[Comment] *g. News.*

Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm, [emphasis added]

\* \* \* \* \*

"*h. Private Facts.*

Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life.

\* \* \* \* \*

"The extent of the authority to make public private facts is not, however, unlimited . . . In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards,

would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure." [emphasis added]

The petition under review, of course, attempts no cause of action for a defamatory invasion of privacy or outrageous conduct publication. The recovery proposed is for negligence. The nature of the public interest which favors the news medium publisher with a privilege, however, remains constant: that the matter published was of a legitimate public concern.

<sup>28</sup>The "unwritten policy" [the news medium defendant concedes in the answers to interrogatories] not to print the name and address of a female victim of a reported male attempted or actual sexual assault is nothing more than a usual news medium practice in conformance with precepts of "common decency" and the discerned "mores of the community" Restatement (Second) of Torts § 652D, comments h and g (1977). The practice "indicates a general belief that such information is actually of no legitimate public concern, and can seriously injure innocent persons who have already suffered grievously." Publication of Facts - Victim of Sex Crime, 86 A.L.R.3d 80, 82; State v. Evjue, 253 Wis. 146, 33 N.W.2d 305 (1948); Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502 (4th Cir. 1963). A deviation from that industry standard, therefore, becomes evidence of negligence, and clarifies the cause of action the petition intends. Hannah v. Mallinckrodt, Inc., \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Mo. banc 1982), No. 62325, adopted April 26, 1982. The news publication of the defendant Columbia Daily Tribune reports the victim to have said that the assailant made no effort to molest her. Our prior discussion has determined that the allegations of the petition enhanced by the interrogatory responses, taken at most favorable intentment, allow inference that, despite no actual molestation was offered before the victim escaped, the purpose of the abduction was for sexual purposes, among others.

The several defendants cite Hood v. Naeter Brothers Publishing Co., 562 S.W.2d 770 (Mo.App.1978). That case was for the outrageous conduct publication of the name and address of the sole witness of a violent crime at a time when the criminals were still at large. The court held [l.c. 772] that such a publication "may be unwise but it does not go beyond the bounds of human decency" - and so denied recovery. The court then added, concededly as dictum, that "the published information was a matter of public record and readily available to all interested persons." The court cited no local statute or decision for that dictum, but rather adverted to a constitutional consideration, neither raised nor argued by the litigants - the effect of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Cox, as we noted, dealt with judicial records, not with any official action before arrest. Cox holds, compatibly with our own law [Laun v. Union Electric Co. of Missouri, 350 Mo. 572, 166 S.W.2d 1065,

1073 [15,16] (1942)] that the publication of judicial records is absolutely privileged. *Cox* holds no more than that publication of rape victim name information in a [judicial] record already open to the public does not give a basis for an invasion of privacy suit. That is because [*Cox*, l.c. 494] "interests in privacy fade when the information involved already appears on the public record." Information already open to the public, of course, is also open to the press for publication. *Cox* has nothing to do with extra-judicial reports, such as a report of crime to the police not a public record so that facet of the *Hood* opinion is not only gratuitous but misplaced.

That the publication of the name of a witness to a crime while the criminals are still at large does not amount to outrageous conduct does not prove an analogy that such conduct was not negligent. *Hood* [l.c. 772] observed that the publication may have been "unwise." [imprudent? unreasonable? negligent?] We have treated - as have the defendants - the defamation, right of privacy and outrageous conduct torts alike for the sake of argument and to simplify decision. The development of these remedies, however, show a kinship between defamation and privacy which the outrageous conduct remedy simply does not share. The interest the defamation remedy protects is: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt [and] reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75 (1966), l.c. 92, concurrence of Mr. Justice Stewart. The right to privacy attests to a value equally as basic: "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men" - [Mr. Justice Brandeis in dissent, *Olmstead v. United States*, 277 U.S. 438, 478 (1928)] - later given constitutional stature in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The outrageous conduct remedy, on the other hand, protects an interest more peripheral: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'" [emphasis added] *Restatement (Second) of Torts* § 46, comment d (1965) cited as the basis for the tort and adopted as the law of Missouri in *Pretsky v. Southwestern Bell Telephone Co.*, 396 S.W.2d 566, 568[2] (Mo. 1965) and followed in *Hood*, supra. The outrageous conduct tort remedy, therefore, protects hurt feelings - an interest lesser than the concern of a civilized society for personal reputation, privacy and security - and so, commensurately with the reality of organized life which expects each person to bear the rough language and inconsiderate conduct of others [*Restatement (Second) of Torts* § 46, comment d (1965): *Pretsky*, supra, l.c. 568; *Hood*, supra, l.c. 771] requires a greater proof to sustain recovery than any of the

other three torts. To recover for an outrageous conduct tort the proof must be such that an average person would declare the conduct to be "Outrageous." To recover for negligence, as the petition pleads, an average person would declare the conduct only careless. Hood bears neither by analogy nor by legal analysis on the sufficiency of the averments of the petition as a valid and subsistent cause of action.

#### **26KIDNAPPED WOMAN ESCAPES FROM HER ABDUCTOR'S CAR**

By NATE BROWN of the Tribune's staff

A 24-year-old Columbia woman told police she was abducted at gunpoint early this morning, but escaped from her kidnapper's car a few blocks away.

Sandra Kay Hyde, 4334 Bethany Drive, told police the man who forced her into his car told her: "You will do what I want you to do, or I will blow your brains out."

She told police she was walking on the north side of Broadway near Fifth Street when a late-model Mustang pulled up to the curb. A lone man inside opened the passenger door, pointed a sawed-off shotgun at her and ordered her into the car.

The man kept the shotgun pointed at her as they headed west on Broadway, she said. Her chance to escape came when her abductor looked away as he turned the car north onto Garth Avenue.

The man grabbed her dress as she fell out of the car, she said, but she was able to escape anyway and run east on Broadway to the By George Disco, where she called police at 12:35 a.m.

Hyde said she saw the man driving on First Street when she reached the disco, and one more time in the area while she awaited an officer's arrival.

The man did not assault or try to molest her while she was in the car, she told police.

She described her kidnapper as 6 feet tall, weighing more than 200 pounds, having a heavy build, red bushy hair and a full red beard and mustache. The car was a red, late-model Ford Mustang.

27"Plaintiff has suffered nervous and physical shock and mental anguish and is unable to be alone, all as a direct and proximate cause of Defendants' actions and continues to be fearful, anxious, nervous and lives in a constant state of nervous tension." The petition then seeks - compatibly with the Gertz constitutional standard which prohibits a punitive damage award even to a private individual in the absence of a pleading and proof of actual malice - only actual damages.

A46

**APPENDIX C**



**Missouri Court of Appeals**

WESTERN DISTRICT

1000 OAK STREET

**Kansas City, Mo. 64106-2970**

**August 3, 1982**

CHARLES C. HANCOCK, JR.  
JAMES H. HOFFMAN, JR.  
DAVID A. HUGHES, JR.  
DELESTY M. HUGHES, JR.  
DONALD L. HUGHES, JR.  
WILLIAM S. HUGHES, JR.  
DONALD S. HUGHES, JR.  
JONATHAN L. HUGHES, JR.  
LARRY S. HUGHES, JR.  
ANTHONY R. HUGHES, JR.  
HAROLD L. HUGHES, JR.

DONALD L. HUGHES, JR.  
JAMES H. HOFFMAN, JR.

ROBERT J. STEVENS, JR.

AREA CODE 816  
476-2970

**IMPORTANT NOTICE**

**Re: Sandra K. Hyde  
Vs.  
City of Columbia, Missouri, et al  
WD 32406**

**Respondent's (Tribune Publishing Company) Motion for Rehearing -  
OVERRULED.  
Transfer to Supreme Court-Denied. SEE RULE 83.03**

**Respondent's (City of Columbia, Missouri) Motion for Rehearing -  
OVERRULED.  
Transfer to Supreme Court - DENIED. SEE RULE 83.03**

**cc: Fred Dannov  
Wade Ford  
Terence Porter**

**APPENDIX D**

**No. 64306**

**IN THE SUPREME COURT OF MISSOURI**

**WD #42306**

**May Session 1982**

**Sandra K. Hyde,**

**Appellant,**

**vs. TRANSFER**

**City of Columbia, Mo., et al.,**

**Respondents.**

Now at this day, on consideration of Respondent City of Columbia, Missouri's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Now at this day, on consideration of Respondent Tribune Publishing Company's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Gunn, J., not participating.

**STATE OF MISSOURI—SCT.**

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session

**A48**

**thereof, 1982, and on the 13th day of September 1982, in  
the above entitled cause.**

**Given under my hand and seal of said Court,  
at the City of Jefferson City, this 13th day  
of September 1982.**

**/s/ Thomas F. Simon Clerk.**

**/s/ (Illegible) D.C.**

RECEIVED

JAN 31 1983

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

NO. 82-982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

---

TRIBUNE PUBLISHING COMPANY d/b/a  
COLUMBIA DAILY TRIBUNE, and  
NATE BROWN,  
Petitioners,

vs.

SANDRA K. HYDE and CITY OF  
COLUMBIA, MISSOURI,  
Respondents

---

Brief of Respondent Sandra K. Hyde  
In Opposition to Petition For Certiorari

---

FRED DANNOV  
1103 East Broadway  
P. O. Box 7164  
Columbia, Missouri 65205  
Attorney for Respondent,  
Sandra K. Hyde

---

RESPONDENTS ELABORATION  
TO QUESTIONS PRESENTED  
BY PETITIONERS

Can a newspaper be sued for fault in negligence for actual damages by  
a private person alledging a breach of duty causing foreseeable results.

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TABLE OF AUTHORITIES

Gertz v. Robert Welch, Inc., 418 U.S., 323, (1974)

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)

New York Times Co. v. Sullivan, 376 U.S. 254, (1964)

Smith v. Daily Mail Publishing Co., 443 U.S. 97, (1979)

United States Constitution Amendment I & XIV.

No. 82-982  
In the Supreme Court of the United States  
October Term, 1982

---

TRIBUNE PUBLISHING COMPANY d/b/a  
COLUMBIA DAILY TRIBUNE, and  
NATE BROWN,  
Petitioners,

vs.

SANDRA K. HYDE and CITY OF  
COLUMBIA, MISSOURI,  
Respondents.

BRIEF OF RESPONDENT, SANDRA K. HYDE, IN OPPOSITION  
TO PETITION FOR CERTIORARI

Respondent, Sandra K. Hyde, requests the Court deny the petition for a writ of certiorari seeking review of the decision of the Missouri Court of Appeals of June 15, 1982 and the Order of the Supreme Court of Missouri of September 13, 1982. The decision involved appears in the appendix to the petition at pages A-3 to A-31.

SUPPLEMENT TO STATEMENT OF THE CASE

That right after the attempted abduction by the unknown male assailant on August 20, 1980, at about 12:15 a.m., Sandra K. Hyde reported the offense to the police department of the City of Columbia, Missouri.

At this time there was a written policy of Respondent, City of Columbia, that no police offense reports of major felonies should be given to the news media and a victim's identity should not be released if the victim could identify the assailant or if a sex crime victim. The police offense report designated the offense as a kidnapping and stated the victim

could identify the assailant.

Shortly after the offense, the police department of the Respondent, City of Columbia, gave the police offense report made by Sandra K. Hyde to the Petitioners, Nate Brown and The Tribune Publishing Company, who requested it. At this time the newspaper had a policy not to publish the name and address of female victims of an attempted or actual sexual assault.

The Petitioners placed Respondent, Sandra K. Hyde's name and address and described the unknown assailant and the incident in the story which appeared in the afternoon's edition of the newspaper of August 20, 1980.

The assailant appeared at Respondent's, Sandra K. Hyde, home on the evening of August 20, 1980, and she was terrorized at her home and on her job on eight (8) different occasions.

Respondent Sandra K. Hyde filed her petition in the Circuit Court of Boone County, Missouri, on September 30, 1980, and to this date has been involved in the appellate process. The Circuit Court of Boone County, Missouri has on January 11, 1983 notified the parties that a trial date on this case is set for March 9, 1983.

#### REASONS WHY THE WRIT SHOULD BE DENIED

Respondent reads Petitioner's argument as basically telling this Court (page 18) that this decision allowing a negligence action against a newspaper will emasculate the newspapers. Are they stating that they have no responsibility for their possible torts; that they are above the law? I cannot accept this. The pace of modern life makes individuals, business

and government responsible for its torts. Why should a newspaper be totally immune. It should occupy a protected place to insure its ability to publish but it should not claim society is better off by the newspaper acting with total license, paying no attention to the rights of others or to its own policies established to protect persons from foreseeable injury.

Neither appellant's suit nor the Missouri Court's opinion has revoked the First Amendment or has shackled the daily operation of the newspaper since the judgment was rendered on August 3, 1982. The decision only recognizes that crime victims have some rights when they do their public duty and report criminal offenses to the police and the police and news media have an obligation to perform their important functions without carelessly ignoring their duties to the victim and causing foreseeable serious injury thereto.

The cause of action the victim asserts against the news medium is for negligence and not on any theory of liability without fault. The events the petition filed by Ms. Hyde describe are of a private person becoming an unwilling victim of a crime--not of one who has injected her person in public controversy. The damages she pleads for are for actual loss. In sum, the petition is valid within the culminated constitutional balance struck by Gertz, which allows a private redress against a newspaper for a negligent publication of information on a theory of fault free from the proof restraints of New York Times.

Petitioners make an issue that Ms. Hyde's petition cannot proceed because they got the information upon request from the police department (page 14). What they don't consider is that both the giving and publi-

cation was a violation of policy of both the police department and the newspaper and this case different from the factual situations in Landmark Communications Inc. 435 U.S. 829 and Smith vs. Daily Mail Publishing Co. 443 U.S. 97. The same reasoning applies to Petitioner's argument that, the Missouri Court has chosen to be the editor by its decision (pages 15-16) as both police and newspaper had previously decided their policy would be not to give or print the information (name and address of the victim) objected to by Ms. Hyde.

#### CONCLUSION

The First Amendment to the Constitution is not violated by the Missouri Court's decision. Newspapers are protected in their rights to publish but the First Amendment does not give newspapers total license to commit torts and damages upon private citizens. Newspapers can and should live up to standards they themselves set up as reasonable and should they violate same, negligence is a legitimate action, provided the Plaintiff can prove her case. That is all she has tried to do since September, 1980. We respectfully request this Court to deny the petition for a writ of certiorari and allow Ms. Hyde to attempt to prove her allegations of negligence.

Respectfully submitted,



FRED DANNOV  
1103 East Broadway, P. O. Box 7164  
Columbia, Missouri 65205

Attorney for Respondent,  
Sandra K. Hyde

January 21, 1983

**CERTIFICATE OF SERVICE**

Fred Dannov certifies that a copy of this response was on the 21<sup>st</sup> day of January, 1983, mailed, postage prepaid to:

Sam L. Colville, Shook Hardy and Bacon, 1101 Walnut Street, 20th Floor,  
Kansas City, Missouri 64106;

Terence C. Porter, Ten North Garth Avenue, Columbia, Missouri 65205;

Scott Whiteside, 1729 Grand Avenue, Kansas City, Missouri 64108;

Lincoln J. Knauer, Jr., Farrington Curtis and Knauer Hart and Garrison,  
750 West Jefferson, Springfield, Missouri 65108;

Hamp Ford, 609 East Walnut Street, Columbia, Missouri 65201.

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1982

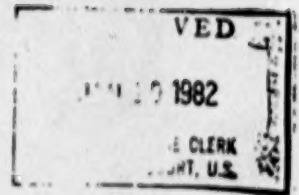
TRIBUNE PUBLISHING COMPANY  
d/b/a COLUMBIA DAILY TRIBUNE and  
NATE BROWN,

Petitioners

vs.

SANDRA K. HYDE and  
CITY OF COLUMBIA, MISSOURI,  
Respondents.

No. 82-982



MOTION AND AFFIDAVIT FOR LEAVE  
TO RESPOND IN FORMA PAUPERIS

COMES NOW Respondent Sandra K. Hyde and states:

1. Petitioners having filed its petition for a writ of certiorari from proceeding to trial on her cause of action filed October 1980 against Petitioner and City of Columbia in the Circuit Court of Boone County, Missouri, thereby causes this Respondent to request this Court for its order allowing Respondent to respond in forma pauperis.

2. This motion is based upon the fact that she is an indigent and has been adjudged the same and allowed to sue in forma pauperis in the Circuit Court of Boone County, Missouri and the Missouri Court of Appeals for the Western District of Missouri.

3. That a copy of the Circuit Court of Boone County order of January 6, 1981 allowing Sandra K. Hyde to appeal as a poor person is attached hereto and made a part hereof.

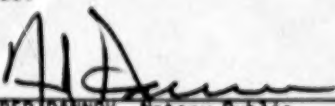
WHEREFORE Respondent, Sandra K. Hyde, requests this Court's Order allowing her to respond without printing as a pauper to the request for Certiorari and should this Court grant Certiorari to allow Respondent, Sandra K. Hyde, to proceed without cost to contest Petitioner's appeal.

3 /  
  
SANDRA K. HYDE, Respondent

STATE OF MISSOURI    )  
                          { ss.  
COUNTY OF BOONE    )

The above, Sandra K. Hyde, having appeared before me after being duly sworn on this 7<sup>th</sup> day of January, 1983, states the above motion is true and correct.

My term expires November 24, 1986.

  
\_\_\_\_\_  
FRED DANNOV, Notary Public

NOTICE OF ENTRY OF ORDER OR JUDGMENT (TO BE GIVEN BY CLERK TO ALL  
PARTIES NOT IN DEFAULT WHO ARE NOT PRESENT IN OPEN COURT  
WHEN ORDER OR JUDGMENT IS ENTERED)

(Supreme Court Rule 74.78)

STATE OF MISSOURI,  
COUNTY OF BOONE

} ss

IN THE CIRCUIT COURT WITHIN AND FOR THE COUNTY OF BOONE, STATE OF MISSOURI

SANDRA K. HYDE

Plaintiff

vs

CITY OF COLUMBIA, MISSOURI, et al

Defendant

No. CV180-16Q1CC

TO Fred Dannov

, ATTORNEY FOR Plaintiff

YOU ARE HEREBY NOTIFIED that on the 6 day of January, 19 81, the court  
duly entered the following:

An order to the following effect

"Plaintiff is given leave to prosecute appeal as poor person." Judge Roper

MAXINE OWENS

Clerk of the said Court

by

*Ran Pate*

Deputy

Said notice was mailed to the above addressee on the 7 day of January

, 19 81.